1859

(17,644.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 530.

CHARLES M. WHITE, JOHN C. THOMPSON, AND HENRY ECKSTEIN

vs.

AUGUST T. SCHLOERB, EUGENE B. SCHICKEDANTZ, AND HENRY ROEWITZ, TRUSTEE.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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1 In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1899, January Session, 1900.

In the Matter of AUGUST T. SCHLOERB and EUGENE B. SCHICKEDANTZ, Bankrupts.

CHARLES M. WHITE, JOHN C. THOMPSON, and Henry Eckstein, Petitioners,
v.
AUGUST T. SCHLOERB, EUGENE B. SCHICKEDANTZ, and Henry Roewitz, Trustee.

No. 641. Original. In Bankruptcy.

In this case, duly argued and submitted to this court, there arise questions of law, concerning which this court desires the instruction and advice of the Supreme Court of the United States.

On the 13th day of September, 1899, August T. Schloerb and Eugene B. Schickedantz, who were respectively residents and inhabitants of the eastern district of Wisconsin, and who were copartners in trade in the said district, filed their voluntary petition in bankruptcy in the district court of the United States for that district. On the same day they were duly adjudged bankrupt
2 by that court and the matter referred to a referee in bankruptcy for further proceedings according to law. They had at that date a stock of goods contained in a store, the entrance to which was locked by the direction of the referee. Thereafter, on the 21st day of September, 1899, James Cogan and Bernard Cogan, who were copartners, commenced an action of replevin against the bankrupts in the circuit court of the State of Wisconsin for the county of Winnebago, in which county the store of the bankrupts was located, to recover the possession of certain specified goods then in the store of the bankrupts and forming part of their stock of goods. On the same day the proper undertaking and requisition to the sheriff of the county of Winnebago, according to the law of the State of Wisconsin, were delivered to the petitioner Charles M. White, who was then the sheriff of the county, who delivered it for execution to the petitioner Henry Eckstein, who was the undersheriff of said sheriff. In pursuance of said requisition the undersheriff, on the same day and before the selection and appointment of a trustee in the bankrupt proceedings, forcibly entered the store of the bankrupts and took possession of certain goods—part of the goods specified in the writ of replevin. On the 23rd day of September, 1899, the bankrupts presented their petition to the district court of the United States for the eastern district of Wisconsin, setting forth the facts above recited, and also alleging that the goods so taken under the writ of replevin were part of a bill of goods purchased by them of the plaintiffs in that writ, and were their lawful property. The petition alleges that the goods were in the possession of the petitioners, the sheriff and undersheriff mentioned, and John C. Thompson, the attorney for the plaintiffs

in the writ of replevin, and asked the court that they be
3 compelled to redeliver the goods to the district court sitting in bankruptcy, from whose possession they were taken, and that they be enjoined from any disposition thereof. Upon the filing of the petition the district court issued its mandate requiring the petitioners here, the sheriff, the undersheriff, and the attorney mentioned, to show cause before that court, at a time and place mentioned, why the seizure of the goods under the writ of replevin should not be vacated and set aside and the goods returned to the bankrupts or placed in the possession of the marshal of the court, or such other person as the court should direct, and why they should not be respectively enjoined from interference with the property so seized, and in the meantime restraining them from such interference. The petitioners specially appeared upon the return day mentioned in the mandate and moved the district court to set aside and vacate its mandate or order to show cause for want of jurisdiction in the court of bankruptcy over the subject-matter, and also presented proof by affidavit to the effect that the assertion of title to the goods in question by the plaintiffs in the writ of replevin was founded upon the claim that the bankrupts had purchased the goods of them upon false and fraudulent representations upon which reliance had been placed; that before the writ of replevin they had elected to rescind the sale and had demanded of the bankrupts the return of the goods. The court of bankruptcy at the hearing and on the 26th day of October, 1899, made the following order: "It is hereby ordered that said Charles M. White, Henry Eckstein, and John C. Thompson be, and they are hereby, restrained from sale or other disposition of the property mentioned in said petition herein, and they are hereby directed to turn over
4 and deliver the said property so taken by them from the estate of the bankrupts to the trustee appointed herein within twenty days from the date of this order; and it is further ordered that the trustee on delivery of the said property keep the same separate and apart from other property, to abide the further order of the court, and that in case sale of said property is hereafter ordered that the proceeds of said sale be kept separate and apart to abide such further order of the court."

The opinion of the court upon that hearing is reported *In re* Schloerb, 97 Fed. R., 326. The petitioners here by their original petition filed in this court have presented the matters of law raised by the order so made by the district court sitting in bankruptcy.

The questions of law upon which this court desires the advice and instruction of the Supreme Court are:

First. Whether the district court sitting in bankruptcy had jurisdiction by summary proceedings to compel the return of the property seized.

Second. Whether, after adjudication in bankruptcy, an action in a State court can be commenced and maintained against the bankrupt to recover property in the possession of and claimed by the bankrupt at the time of the adjudication.

Third. Whether the property of a bankrupt upon his adjudica-

tion in bankruptcy is *in custodia legis* of the bankrupt court and can be taken possession of under process of a State court.

These questions the court on this day orders certified and submitted to the Supreme Court of the United States for its proper decision.

January 25, 1900.

WM. A. WOODS.
JAS. G. JENKINS.
ROMANZO BUNN.

Endorsed on cover: File No., 17,644. U. S. C. C. of appeals, 7th circuit. Term No., 530. Charles M. White, John C. Thompson, and Henry Eckstein *vs.* August T. Schloerb, Eugene B. Schickedantz, and Henry Roewitz, trustee. (Certificate.) Filed February 15th, 1900.

IN SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 150.

In Re CHARLES M. WHITE, JOHN C. THOMPSON, AND HENRY SCHUTTER,

Petitioners,

vs.

AUGUST T. SCHLOEMER, EUGENE R. SCHLOEMANTZ, AND HENRY SOEMTZ, TRUSTEE,

Respondents.

Certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

PETITIONERS' BRIEF.

CHAS. W. PELKER,
Counsel for Petitioners.

IN SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 530.

IN RE. CHARLES M. WHITE, JOHN C. THOMPSON AND HENRY ECKSTEIN, PETITIONERS,

vs.

AUGUST T. SCHLOERB, EUGENE B. SCHICKEDANTZ, AND HENRY ROENITZ, TRUSTEE, RESPONDENTS.

CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner's Brief.

STATEMENT OF THE CASE.

On Sept. 13, 1899, August T. Schloerb and Eugene B. Schickedantz, copartners, filed their voluntary petition in bankruptcy in the District Court of the United States for the Eastern District of Wisconsin, and were, on the same day, adjudged bankrupts, and the matter referred to a referee in bankruptcy for further proceedings according to law. The bankrupts had conducted a boot and shoe store, which, upon the adjudication of bankruptcy, was locked by the bankrupts under the direction of the referee.

Thereafter, on September 21, 1899, James Cogan and Bernard Cogan, copartners, commenced an action of replevin against the said bankrupts in the circuit court of Winnebago county, Wisconsin, to recover the possession of certain specified goods then in the bankrupts' store. The proper undertaking and requisition in replevin in accordance with the laws of the state of Wisconsin, was delivered to the sheriff of Winnebago county, Charles M. White, one of the petitioners in this case, who delivered the papers for execution to

the petitioner, Henry Eckstein, an under-sheriff. In pursuance of said requisition, the under-sheriff, on the same day, and before the selection and appointment of the trustee in the bankruptcy proceeding, forcibly entered the store of the bankrupts, and took possession of certain goods, being a part of the goods specified in the writ of replevin.

September 23, 1899, the bankrupts presented their petition to the District court of the United States for the Eastern District of Wisconsin, setting forth the above facts, and also alleging that the goods so taken in the replevin proceeding were their lawful property. The petition alleged that the goods were in the possession of the petitioners, the sheriff and under sheriff mentioned, and John C. Thompson, the attorney for the plaintiffs in the replevin proceeding, and asked the court that they be compelled to redeliver the goods to the district court sitting in bankruptcy, and that they be enjoined from disposing of them.

Upon the filing of the petition the district court issued its mandate, requiring the petitioners here, the sheriff, the under-sheriff, and the attorney mentioned, to show cause before that court, why the seizure of the goods under the writ of replevin should not be vacated, and the goods returned to the bankrupts, or placed in the possession of the marshal or other person, and why tney shonld not be enjoined from interfering with the property so seized.

On the return day, the petitioners here specially appeared and moved the district court to set aside and vacate its mandate or order to show cause, for want of jurisdiction in the court of bankruptcy, over the subject matter, and also presented proof by affidavit to the effect that the assertion of title to the goods in question by the plaintiffs in the writ of replevin was founded upon a claim that the bankrupts had purchased the goods of James Cogan and Bernard Cogan upon false and fraudulent representations, upon which reliance had been placed; that before the writ of replevin they had elected to rescind the sale, and had demanded of the bankrupts the return of the goods.

The District Court of the United States entered an order that said Charles M. White, Henry Eckstein and John C. Thompson be restrained from selling or disposing of said property, and directing

them to turn over and deliver the same to the trustee, in the bankruptcy proceeding, and further directing the trustee, on receipt of the property, to keep the same separate and apart from the other property, to abide the further order of the court.

The petitioners, Charles M. White, Henry Eckstein and John C. Thompson thereupon filed their original petition in the United States Circuit Court of Appeals for the Seventh Circuit, praying said court to superintend and revise, in the matter of law arising therein, the proceedings had in the District Court, and thereupon a citation and notice to the bankrupts and their trustee in bankruptcy was issued and served, and the said bankrupts and their trustees in bankruptcy duly appeared in said Circuit Court of Appeals, and demurred to the petition of the petitioners herein. Thereafter a hearing was had in said Circuit Court of Appeals for the Seventh Circuit, and thereupon the said Court certified to this Honorable Court certain questions of law upon which it desires the the advice and instruction of this court for its proper decision. The questions certified are as follows:

1. Whether the District Court sitting in bankruptcy had jurisdiction, by summary proceedings, to compel the return of the property seized?

2. Whether, after an adjudication in bankruptcy, an action in a state court can be commenced and maintained against the bankrupt to recover property in the possession of, and claimed by the bankrupt at the time of the adjudication?

3. Whether the property of the bankrupt, upon his adjudication in bankruptcy, is in custodia legis of the bankrupt court, and can be taken possession of under process of a state court?

BRIEF OF ARGUMENT.

Though the amount at stake in this case is small, it is believed that important questions of jurisdiction involving the construction of the bankruptcy act of 1898, are involved. There is considerable diversity of opinion among the different district courts and circuit courts of appeal in regard to the proper interpretation of the act, and one of the reasons for certifying this case here is to have, if possible, a final determination of at least a part of these questions, as to which the lower courts are now at sea.

Before taking up the argument of the three questions certified up, we desire first briefly to consider the nature of the controversy between the parties, and second, the jurisdiction conferred upon the bankruptcy and state courts by the bankruptcy act of 1898, because in our opinion upon these questions the answers to the questions certified up must in a large part depend.

1.

NATURE OF THE CONTROVERSY.

James Cogan and Bernard Cogan, who were the plaintiffs in the replevin suit in the state court, claim to be the absolute owners of the property seized in the replevin action. Their claim to ownership and right of possession is founded on that rule of law *that when a purchaser makes false and fraudulent representations as to his sol vency and means of payment, and thereby induces the vendor to sell him on credit, he may rescind the contract and thereupon stands as the owner of the property and the party entitled to the possession thereof.*

Donaldson v. Farwell, 93 U. S. 631;

John V. Farwell Co. v. Hilton, 84 Fed. Rep. 293;

Montgomery v. Bucyrus Machine Works, 92 U. S. 257;

Benjamin on Sales, Curtis edition, Vol. I, 665, star paging 412 sec. 554;

Root v. French, 13 Wend. 570;

Buffington v. Gerrish, 15 Mass. 156;

Chitty on Contracts 356;

Bussing v. Rice, 2 Cush. 48;

Oswego Starch Factory v. Lendrom, 57 Iowa 153;

Carl v. McGonigal, 58 Mich. 567.

Farley v. Lincoln, 51 N. H. 577;

From the above it will be seen that Bernard Cogan and James Cogan, the plaintiffs in the replevin suit in state court claim to be the owners and claim to be entitled to the possession of the property in controversy.

And their right to the property was as great, as full and complete and as valid against the trustee in bankruptcy as it was against the bankrupts themselves.

Donaldson v. Farwell, 93 U. S. 631.

Therefore Bernard and James Cogan, and those representing them herein clearly claim the ownership and possession of the property adversely to the bankrupts and their trustee, and any controversy in regard to the ownership or possession is therefore between the bankrupts or their trustee in bankruptcy an *an adverse claimant.*

II.

Our contention is, *that the proper tribunals to determine controversies between the trustee and adverse claimants as to the ownership and right of possession of property are the state courts or the circuit courts of the United States when the amount and citizenship of the parties are such as give them jurisdiction*, and that by the bankruptcy act of 1898 *exclusive* jurisdiction of such controversies is given to the state courts and the circuit courts of the United States in proper cases.

Courts of bankruptcy are not courts of general jurisdiction, but are courts of limited and special jurisdiction.

In determining whether or not the courts of bankruptcy, under the act of 1898, have jurisdiction or not over controversies between the trustee and adverse claimants in regard to the ownership or possession of property, we must consider and interpret the bankruptcy act of 1898 in the light of the history of preceding bankruptcy laws in the United States.

Under the former bankruptcy acts of 1841 and 1867, jurisdiction of controversies between the assignees in bankruptcy and adverse claimants was conferred by the acts upon courts of bankruptcy.

See sec. 2, Bankruptcy Act of 1867; and sec. 8 of the Bankruptcy Act of 1841.

And the state courts were not *expressly* given jurisdiction thereof.

The decisions in the district courts of the United States were were conflicting as to whether or not the bankruptcy courts had exclusive jurisdiction of such controversies, or whether the state courts had concurrent jurisdiction.

This conflict in the decisions was finally set at rest by the Supreme Court of the United States. In Eyster v. Gaff, 91 U. S. 521, this court, on page 525, said: "The opinion seems to have been quite prevalent in many quarters at one time that the the moment a man is declared bankrupt, the district court which has so adjudged draws to itself by that act not only all the control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court except insofar as the circuit courts have concurrent jurisdiction, and that other courts can proceed no farther in suits of which they had at that time full cognizance, and it was a prevalent practice to bring any person who contested with the assignee any matter growing out of disputed rights of property or of contracts into the bankrupt court by the service of a rule to show cause, and to dispose of their rights in a summary way. This court has steadily set its face against this view. *The debtor of the bankrupt, or the man who contests the right to real or personal property with him loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions.* If it has, for certain classes of actions, conferred a jurisdiction for the benefit of the assignee in the circuit and district courts of the United States, it is concurrent with and does not divest that of the state courts."

See also Smith v. Mason, 14 Wall, 433;

Burbank v. Bigelow, 92 U. S. 179, where this court says: "That the bankrupt law has not deprived the state courts of jurisdiction over suits brought to decide rights of property between the bankrupt (or his assignee) and third persons."

In Burbank v. Bigelow, the action was commenced, as in our case, after the filing of the petition in bankruptcy, and after the adjudication against the bankrupt and before the assignment by the bankrupt to the assignee, as in our case it was commenced against the bankrupt before the appointment of a trustee.

We have referred to these decisions here simply to show that even though, in the bankruptcy act of 1867, jurisdiction of contro-

versies with adverse claimants was expressly conferred upon the bankruptcy court, that it was settled by Your Honorable Court that the contestant still had the right to bring an action to decide such controversy in the proper state court, or in the circuit court of the United States, if that court had jurisdiction by reason of the citizenship of the parties and the amount involved.

THE BANKRUPTCY ACT OF 1898.

It will be noticed in the first place, that the bankruptcy act of 1898 nowhere grants to the bankruptcy courts the jurisdiction of controversies between adverse claimants and the bankrupts or their trustee. That is, that it has no section 2, like the bankruptcy act of 1867, and no section 8, like the bankruptcy act of 1841.

Therefore, it may be well said that there is no foundation for the argmment that the bankruptcy court, under the act of 1898, has jurisdiction of such controversies. The intent of Congress to take away such jurisdiction is apparent from the ommission of the grants of such jurisdiction contained in the prior acts.

Bankruptcy courts depend for their jurisdiction upon the terms of the act creating them. They are not courts of general jurisdiction, and there is no presumption in favor of their jurisdiction.

If the objection to the jurisdiction of the bankruptcy courts over such controversies was based alone upon the failure of the act to provide such jurisdiction, we think that the objection would have to be sustained.

The argument is, however, not so limited. Not only does the bankruptcy act of 1898 fail to grant to bankruptcy courts such jurisdiction, but it goes further and limits them from exercising such jurisdiction.

Such is the plain reading of the act. In subdivision 7, section 2, chapter 2, of the act of 1898, it is provided: "That courts of "of bankruptcy have jurisdiction (7) to cause the estates of "bankrupts to be collected, reduced to money and dis- "tributed, and determine controversies in relation thereto, *ex- "cept as herein otherwise provided.*"

That is, Congress, fearful lest the jurisdiction to cause estates of bankrupts to be collected and determine controversies in regard

to the collection thereof, should be construed to give the bankruptcy courts jurisdiction over controversies between adverse claimants and the trustee, inserted therein the words, "*except as herein otherwise provided.*" And in Chapter 4, "Courts and procedure therein," and in section 23 of said chapter entitled "Jurisdiction of United States and state courts," congress carefully fixed a limit to the jurisdiction of courts of bankruptcy in regard to such controversies.

> The section referred to is as follows: "Sec. 23. Jurisdiction of United States and state courts. a. The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy between the trustees as such and adverse claimants concerning the property acquired or claimed by the trustees in the same manner, and to the same extent only as though bankruptcy proceedings had not been instituted, and such controversies had been been between the bankrupts and such adverse claimants.
>
> Suits by the trustee shall *only be brought and prosecuted in the courts where* the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them, if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

That the above section was intended to fix and limit the jurisdiction of the different courts over controversies with adverse claimants, we see no reason to doubt. The title of the section, "Jurisdiction of United States and *state* courts," shows that it was so intended. It limits the United States circuit court to jurisdiction of such controversies where the amount and citizenship would have given it jurisdiction without the act, *except as to proceedings in bankruptcy*, where the United States circuit court, under subdivision c., of the same paragraph has concurrent jurisdiction with courts of bankruptcy of offenses enumerated in the act, and such jurisdiction as the United States circuit court may have in bankruptcy proceedings under subdivision b. of section 19, in the same Chapter 4.

It also limits the right of the trustee to bring actions to the same courts where the bankrupt might have brought or prosecuted them, if proceedings in bankruptcy had not been instituted,

and that this subdivision b. expressly relates to *state* courts, and that the trustee is limited to actions therein where controversies arise with adverse parties is shown by the title of the section, which is, "Jurisdiction of the United States and *state courts.*"

That Congress did not intend to give bankruptcy courts jurisdiction over such controversies is further shown by the fact that no method of appeal from decisions in such controversies is provided for in the law.

If Congress had intended (as we claim it did) to limit the jurisdiction of suits between the trustee or bankrupt and adverse claimants to the same state and federal courts as would have had jurisdiction, if there had been no bankruptcy proceedings, it would, in determining what provisions of law were necessary to carry out such plan, have had before it these two facts: 1st., that under the old bankruptcy acts such jurisdiction had been expressly granted and conferred upon bankruptcy courts; and 2nd., that notwithstanding such grants of jurisdiction to the bankruptcy courts, the Supreme Court of the United States in Eyster v. Gaff, and other cases cited above, had determined that the adverse claimant had the right, without special grant in the law to bring such suits in the proper state courts. Therefore, it must have appeared to them necessary to refuse in the present act to grant such jurisdiction to the bankruptcy court, and to provide that the trustee could only bring such suits in the same courts where the bankrupt might have brought them if proceedings in bankruptcy had not been instituted. That is, it was necessary, under the decision of this court in Eyster v. Gaff to provide specially for the bringing of suits against the trustee.

And we find in examining the present bankruptcy act that Congress proceeded in exactly that way, and in that act, unlike the previous acts, no such jurisdiction is conferred upon the bankruptcy courts. And further, the jurisdiction of suits brought by the trustee *is expressly limited to those courts where the bankrupt might have brought the suit.* And under Eyster v. Gaff, the adverse claimant has always had the right to proceed in the state court, or in the circuit court of the United States, if the citizenship and amount involved gave it jurisdiction.

Such seems to us to be the plain meaning of the act. Jurisdiction of such controversies exists only in the courts which would have had jurisdiction had bankruptcy proceedings not been brought except by consent of the parties. It seems to us that this is the natural construction, the reasonable construction, the necessary construction, in the light of all the facts.

The bankruptcy court, it will be admitted, as provided in Chapter 2, section 2 of said act, has jurisdiction of all matters in the bankruptcy proceeding, but such jurisdiction in bankruptcy proceedings does not extend to the determination of controversies as to the ownership or right of possession of property between the trustee or the bankrupt and adverse claimants, nor is such jurisdiction on the part of the bankruptcy courts at all essential or necessary. Such is the legitimate conclusion deducible from the decisions of this court in upholding, under the prior law, the concurrent jurisdiction of the state courts in such proceedings. For if it was necessary that the bankruptcy court should decide such proceedings, it would be necessary that it should decide all of them, and the holding that the state courts had concurrent jurisdiction, under the old law, of such controversies, and the satisfactory practice under such rulings shows conclusively that such jurisdiction is not at all necessary or essential to courts of bankruptcy.

If it were at all necessary in interpreting the law to take into consideration the intentions of Congress as found and expressed in the debates on the bankruptcy bill, it would be found that the construction of the law contended for by us, is that which it was understood in both houses of Congress would be put upon it.

Bankruptcy bills of different forms and with different provisions have been before Congress periodically for the last eight or ten years. The bill which finally passed was introduced in the Senate March 22, 1897, and is known as S. 1035.

Senate Journal, 1st session 55th Congress, page 22.

It was reported by the committee on March 23, 1897, by Mr. Lindsay. (Senate Journal, page 23.)

On March 25, 1897, Senator Nelson, as an amendment, offered a substitute bill. (Congressional Record 55th Congress, 1st session, pages 238 and 239.)

April 5, 1897, Senator Lindsay made the opening speech in the senate on the bill reported by the committee. (Congressional Record 55th Congress, 1st session, page 625.)

The substitute offered by Senator Nelson was passed April 22, 1897. It then went to the House, and the House committee reported a substitute, being practically the same bill originally reported by the committee in the Senate, and the bill reported by the House committee as a substitute for the Nelson bill was passed by the House. Subsequently conference committees were appointed by the House and Senate, and the bill as originally presented to the Senate by its committee being the bill reported by the House as a substitute for the Nelson bill was passed, and became a law.

Section 23 of the present law was, I believe, contained in the original bill reported to the Senate by the committee, and in the substitute bill reported by the House, and of course in the bill as passed. Senator Lindsay, in his speech in the Senate (Congressional Record 55th Congress, 1st session, page 625), speaking of the "Courts," said: "United States courts have only a limited jurisdiction, and hence it is necessary to provide with particularity their entire jurisdiction in bankruptcy proceedings, and this is done with care. One of the features of the bill specially pleasing to me, is that it does not attempt to provide new methods for accomplishing results, but, as far as possible adopts those in force under other laws. * * *

In prior bankruptcy laws jurisdiction to try all controversies in bankruptcy has been given to the United States courts, but the provisions of this bill *are quite the reverse*, and under litigation will not, of necessity, be taken to the United States courts, but *will be tried in the courts which would have had jurisdiction of the controversy as between the bankrupt*—had bankruptcy proceedings not intervened—*and the adverse party*. Let me explain how important this is to citizens residing at a distance from where the United States courts convene. I will give an illustration drawn from imagination, of a case in my own state, but it will be equally applicable to any other state. Suppose a transaction is had between a resident of of Louisville and a citizen of one of the counties of Kentucky farthest from

Louisville. When the transaction is entered into, the resident of Louisville, of course, knows that if the matter should become a subject of litigation he would be required to bring suit in the county where the other party to the transaction resides; on the other hand, if the citizen residing in the remote county desires to bring suit, he must in turn go to Louisville. It will be apparent to everyone that this condition ought not to to be disturbed in the event of either of the parties becoming bankrupt. The bill, therefore, provides that if the Louisville party is compelled through adverse circumstances to take advantage of the benefits of the bankruptcy act, and the other party desires to sue his trustee, he must go to Louisville to do so. On the other hand, if the trustee must sue the party residing at a distance from Louisville, he will have to go to the county where the proposed defendant resides. This provision is a complete answer to the just criticisms of the last law, that many people were required to go long distances to the United States courts to litigate controversies with bankrupt estates." And on page 927 he says: "The fact that litigation will continue *in the state courts*, and that referees may be appointed in every county, will prevent the concentration of bankruptcy business in the places where the bankruptcy courts meet."

In the summary of the bankruptcy bill, printed at the request of Senator Lindsay, on page 628 of the same Congressional Record, is the following in relation to jurisdiction: "Section 8. Jurisdiction of the United States and state courts. The proposed plaintiff in a suit against a bankrupt estate may institute proceedings in the appropriate *state* court, or if it has jurisdiction, in the United States circuit court, or, if he desires, in the court of bankruptcy; but the trustee is limited, in the institution of such suits as he may wish to bring, to the court in which the bankrupt, of whose estate he is trustee, might have brought them, if bankruptcy proceedings had not been instituted. These provisions are for the purpose of having controversies litigated in the courts most convenient for the parties litigant and witnesses, *and to prevent the concentration of litigation in the bankruptcy courts.* The defendant and witnesses ought not

to be put to any greater trouble or expense, because the plaintiff has become bankrupt, than they would have been, had he not met with that misfortune."

On April 13, 1897 (See Congressional Record, folio 30, part 1, page 697) Senator Lindsay, in explaining the bill reported by the committee said: "The bill reported by the committee provides that the litigation between the creditors of the bankrupt and and the trustee for the bankrupt, whether the trustee be plaintiff or defendant, shall be had *in the state court*, to which jurisdiction would have attached if no bankruptcy proceedings had been commenced. In other words, *that the bankruptcy court shall not oust the state courts of their jurisdiction* and compel every man to go to the bankruptcy court to have his rights litigated, but upon the contrary, that unless the antagonist of the trustee of the bankrupt shall, by writing, consent to a change of venue to the bankruptcy court, no changes shall be made."

In the debate in the House of Representatives on 1035 S. on February 16, 1898 (See Congressional Record 55th Congress, 2nd session, page 2013) Mr. Henderson, among other things, said: "The jurisdiction of *state courts* to try controversies between the trustees of bankrupt estates and parties claiming adverse interests, is not in any way interfered with. Suits by the trustee shall only be brought in the courts where the bankrupt might have brought them, except for the misfortune of his bankruptcy, unless by the consent of the proposed defendant. Under the last bankruptcy law, the litigation incident to the settlement of estates was conducted almost wholly in United States courts. The result was great inconvenience and much expense to a majority of the people interested in such litigation as principals, witnesses and attorneys. Such will not be the effect under this law. It is proper that such should not be the case, speaking generally in behalf of the administration of justice," and he continued with illustrations of the provisions of the law very similar to those of Senator Lindsay.

In none of the other speeches on the bill is any indication found that any different construction was put upon what is now subdivision 23 of the bankruptcy act.

In Congressional Record, 55th Congress, 2nd session, page 2122, Mr. Bell, in the house said: "That the jurisdiction of the state courts over the litigation between its citizens and between citizens of other states, where it does not equal in amount $2,000, is not disturbed."

Senator Lindsay was a member of the committee which reported the original bill to the Senate. Congressman Henderson was on the committee of the House which had in charge the bill. Both of them put the construction upon the provisions of the bill which is contended for by the petitioners here. No other construction of it appears to have been thought of. The debates clearly disclose the purpose and intention of Congress.

Subdivisions a. and b. of section 23 of the present act must be read together and interpreted from the text, not of either alone, but of both standing together, and what they mean is, that in a proper case the United States circuit court, and in a proper case the state court, shall have jurisdiction of all controversies at law and in equity between the trustee as such, and the adverse claimant concerning the property acquired or claimed by the trustee in exactly the same manner as the same courts would that have had jurisdiction, if there had been no bankruptcy proceedings at all. The decisions of the inferior federal courts under the bankruptcy act of 1898 have not been consistent in regard to the proper construction of section 23.

We are, however, of the opinion that the better considered cases have given to that section the construction contended for by us.

In re. Abraham, 93 Fed. Rep. 767, the circuit court of appeals for the fifth circuit passed upon the question of the construction of that section, and after reviewing the decisions of this court under the old law, on page 779, say: "It is, therefore, apparent that, as a general rule, all controversies at law and in equity, as distinguished from proceedings in bankruptcy between trustees as such or other duly appointed and empowered representatives

of the bankrupt's estate, and adverse claimants, concerning the property acquired or claimed by the trustees or other duly appointed and empowered representatives of the estate, which cannot be or are not adjusted by negotiation, arbitration or compromise, must be abandoned by the trustees or adjudicated in the *state courts*, unless by consent of the proposed defendant suit can be brought in the United States court.

See also Hicks v. Knost, 94 Fed. Rep. 625, where Judge Thompson construes these provisions, and also the argument of the defense in that case that jurisdiction of such controversies was necessary to bankruptcy courts, and finally concludes by taking the same position contended for by the petitioners in this case.

In re. Franks, 95 Fed. Rep. 635;
Goodier v. Barnes, 94 Fed. Rep. 798;
Heath v. Schafer, 93 Fed. Rep. 647;
In re. Price & Co. 1 Am. Bank Rep. 606;
In re. Broadbine, 93 Fed. Rep. 643;
In re. Buntrock Clothing Co., 92 Fed. Rep. 886;
In re. Fowler, 1 Am. Bank. Rep. 637;
In re. J. N. Carter, 1 Am. Bank. Rep. 160;
Mitchell v. McClure, 91 Fed. Rep. 621;
In re. Kelley, 91 Fed. Rep. 504;
In re. Rockwood, 91 Fed. Rep. 363;
Burnett v. Morris Co. 91 Fed. Rep. 365;
Camp v. Zellars, 94 Fed. Rep. 799;
Perkins v. McCauley, 98 Fed. Rep. 286;

There are also a line of cases which hold that 23b. deprives the bankruptcy court of jurisdiction of controversies which might have arisen between the bankrupt and the adverse claimant, but that where the action is one which the bankrupt would himself have had no right to bring, as for instance, an action to set aside a fraudulent conveyance, that the district court in such cases, has jurisdiction.

In re. Brooks, 91 Fed. Rep. 578;
In re. Carter v. Hobbs, 92 Fed. Rep. 594;
Perperdine v. Headley, 98 Fed. Rep. 863;
Layman v. Crosby, 98 Fed. Rep. 542;

Davis v. Bohle, 92 Fed. Rep. 325;
In re. Gutwillig, 90 Fed. Rep. 475.

These cases in the court below were cited against us, but in reality they cannot be said to be opposed to our contention in this case. There is a dictum in the decision in re. Sievers, 91 Fed. Rep. 366, taking a contrary view of section 23, but what is there said was not necessary to the decision, and the case was not affirmed on the appeal to the circuit court of appeals on that ground. In the circuit court of appeals it appears as Davis v. Bohle, 92 Fed. Rep. 325.

The argument of those cases which may be said to take a contrary view of the jurisdiction of the bankruptcy court will be found in In re. Murphy, Vol. 2, Natl. Bank. News & Rep. No. 8, page 393;

In re. Sievers, 91 Fed. Rep. 366;
And in re. Hammond, 98 Fed. Rep. 845.

In reading the opinions in these cases, it will be found that the courts have been compelled to put forced and unnatural construction upon the plain words in the act, and have, as they are forced to admit, gone contrary to the conclusions derived from a historical study of bankruptcy legislation.

See the statement of Judge Lowell in In re. Hammond supra, on page 851.

From the plain wording of the act itself, from the omission of the provisions as to the jurisdiction of bankruptcy courts contained in prior acts, from the express limitations placed upon such jurisdiction in the present act, from the history of previous bankruptcy acts, and from the interpretations placed upon the act by Congress, as shown in the debates on the bill, and from the decisions of this court under the old acts, we are convinced that the true construction of the present act is, *that the bankruptcy courts have no jurisdiction of controversies with adverse claimants of property*, unless with the consent of the claimant, and that *the exclusive jurisdiction of such controversies vests in the state courts, or in the circuit courts of the United States, where the citizenship and amount involved would otherwise give them jurisdiction.*

III.

With this introduction, we come now to the questions certified to this court for answer.

The first is, **whether the district court, sitting in bankruptcy, had jurisdiction by** *summary proceeding* **to compel the return of the property seized.**

It will be noticed, by a reference to the statement of facts, that the property was taken from the petitioners on *an order to show cause* in the district court, and that the property was ordered returned with a provision for its sale, and that the proceeds be kept separate and apart to abide the further order *of that court.*

In other words, the property was in a summary proceeding taken out of the hands of an adverse claimant, and he was left to seek his relief in a court of bankruptcy.

The cases cited under section 1 of our brief, and particularly the case of Donaldson v. Farwell, 93 U. S. 631, have settled the right of the plaintiffs in the action in state court, Bernard Cogan and James Cogan, to retake their property upon disaffirmance of the contract, and it is equally well settled, by the same cases, that this right to retake their property and to hold the same is just as full and valid and complete after bankruptcy and against the trustee as it is before; that is, the bankruptcy proceeding in no way changes the rights of the parties in and to the property.

It is also undisputed that at the time the order to show cause was issued out of the bankruptcy court, the property was then in the possession of the sheriff and the attorneys for the Cogans, who claimed to hold it for them.

Under such circumstances, it seems clear to us that the court had no jurisdiction in a summary proceeding to retake said property, and such was the rule under the bankruptcy act of 1867.

Eyster v. Gaff, 91 U. S. 521;
Smith v. Mason, 14 Wall. 433;
Yeatman v. Savings Institution, 95 U. S. 764;
Marshall v. Knox, 16 Wall. 551.

If it be true, as we have claimed in our brief, under subdivision II, that the district court in bankruptcy has not jurisdiction to

determine this controversy, then it has not jurisdiction, in a summary proceeding, to take possession of property, the title to which it cannot determine.

That is, the present act denying to the bankruptcy court jurisdiction to determine controversies as to property between a trustee in bankruptcy and an adverse claimant *ipso facto* denies the bankruptcy court jurisdiction in a summary proceeding to take from one of the parties to such controversy the subject matter thereof, and must of necessity be construed as denying to the bankruptcy court the right to interfere between the parties in any way which may affect their respective rights therein.

Nor is there any necessity or occasion for its interference.

The law does not authorize that which is vain or useless. And, therefore, if it be true that the bankruptcy court has not jurisdiction to determine the controversy, it has not authority to interfere therein, even to the extent of taking possession of it, as against an adverse claimant, because such taking is only permissible as an aid to the exercise of its jurisdiction over the controversy, and if it has no such jurisdiction, the reason for the taking of possession is wanting.

In re. Brodbine, 93 Fed. Rep. 643, the court, in speaking of the case of Mitchell v. McClure, say: "That if that court had no jurisdiction of the common law action to recover property *a fortiori*, it had no jurisdiction to recover it by a summary process."

If the district court had no jurisdiction to determine the controversy as a whole, it had no jurisdiction to determine a part of the question. The jurisdiction to transfer possession is dependent upon and auxiliary to the jurisdiction to determine the controversy. If the court has not jurisdiction of the controversy, it has not jurisdiction to make the order regarding its possession. In the case at bar, the District Court had no jurisdiction to divest petitioners of their possession, and compel them to go into the bankruptcy court to obtain a determination of their adverse claim.

Under the present act, the bankruptcy court having no jurisdiction whatever to determine the controversy in regard to the

ownership, even in a plenary suit, it seems to us idle for counsel to contend that it has jurisdiction in a *summary proceeding* to do that which it could not do in a suit. The greater includes the less, and if the bankruptcy court has no jurisdiction to determine the controversy, it has no jurisdiction to take the property for that purpose in a summary proceeding. It would be a proceeding vain and purposeless and without reason or utility to support it.

On the other hand, the state courts having, in the replevin proceeding, the jurisdiction not only of the parties, but of the subject matter, and having exclusive jurisdiction of the controversy, should be allowed to go on and determine it, making, if necessary, such other persons parties to it, as may be proper, and as is provided in subdivision B of section 11, of the bankruptcy act.

The second question certified up is, **whether after adjudication in bankruptcy an action in the state court can be commenced and maintained against the bankrupt to recover property in the possession of and claimed by the bankrupt at the time of the adjudication.**

In considering this question it must be borne in mind, that the right of the plaintiffs in the replevin suit in state court to retake their property was unaffected by the pendency of bankruptcy proceedings. Their right to demand and retake the property existed just as much after the filing of the petition and adjudication of bankruptcy, as it did before.

Donaldson v. Farwell, 93 U. S. 639.

No trustee had been appointed. The title to the bankrupts' property, and the right of possession thereof was still in the bankrupts. The decree of bankruptcy did not divest them of their title. No receiver had been appointed, no marshal had been authorized to take possession.

This court in Hamilton v. Rouse. 22 Wall. 263, decided that a decree in bankruptcy will not, under the bankrupt act, have the effect to discharge the debts of the petitioner, nor to divest him of the title to either his real or personal estate, and this court there said: "Prior to the assignment and conveyance authorized and directed by section 14, the title, whatever it be, of the estate belonging to the debtor, both real and personal, remains

unchanged," and on page 275 this court further said "until an assignee is appointed and qualified, and the conveyance or assignment is made to him, the title to the property, whatever it be, remains in the bankrupt, which is the plain meaning of the 14th section of the bankrupt act." And it may be noticed that the provisions of the law of 1867 and the law of 1898 differ from the provisions of the earlier bankruptcy laws in respect to the transfer of title.

Section 70 of the law of 1898 provides that the trustee of the estate of the bankrupt, *upon his appointment and qualification*, shall be vested, by operation of law, with the title of the bankrupt.

Therefore until the appointment of the trustee, the bankrupts were the parties in possession, unlawfully detaining the property of the plaintiffs in the replevin suit in the state court, and being the parties in possession they were the proper parties to demand the possession of and to bring the action against. Of course the trustee, when appointed, succeeded to the bankrupt's rights, if any, and could defend the action for them, and be made a party thereto, as is contemplated and provided in subdivisions b and c of section 11 of the bankruptcy act of 1898.

Under the old bankruptcy act, this court permitted the bringing of such action against the bankrupts by a third person claiming the property after the adjudication and before the assignment by the bankrupt to the assignee.

See Burbank v. Bigelow et al., 92 U. S. 179.

And this court there said, approving of the rule of Eyster v. Gaff, "that the bankrupt law has not deprived the state courts of jurisdiction over suits brought to decide rights of property between the bankrupt (or his assignee) and third persons."

If under the old law such actions were properly brought, then there can be no question at all under the present law, which as we believe, gives the state courts the sole jurisdiction of such controversies.

Burbank v. Bigelow was in many respects like the replevin action in the state court in the case at bar. It was brought

after the filing of the petition in bankruptcy to determine a controversy in regard to property between an adverse claimant and the bankrupts, and the property in controversy had been referred to and described in the schedules filed in the bankruptcy proceeding, while in our case there was no reference to the property in controversy in the schedules in bankruptcy, unless the general reference to the stock in trade of the bankrupts could be held to include them. The same questions of jurisdiction were raised there and the proceeding there was upheld by this court, and the court there said they had recently held in the case of Eyster v. Gaff et al. "that the bankrupt law has not deprived the state courts of jurisdiction over suits brought to decide rights of property between the bankrupt (or his assignee) and third persons, and whenever the state courts have jurisdiction, the circuit courts of the United States have, if the proper citizenship exists." And in that case the court took possession of the property in controversy by a receiver. That case, it is true, was brought in the circuit court of the United States, but this court expresses a willingness to put the jurisdiction of the circuit court of the United States upon the ground that the state court would have had like jurisdiction.

Generally, it may be said that a party who owns property is entitled to the possession of it, as a matter of right. If anybody disputes the right of possession, he is entitled at once to his proper remedy, which in this case is an action in the nature of replevin.

The right to take the property peaceably or by such an action is an important right, and in many instances delay would result not only in great inconvenience, but in great loss and damage to the owner. There is nothing in the bankruptcy act which can be construed to compel a party to await the appointment of a trustee. Such delay might result in a loss of all the property to the party, through the acts of the bankrupts or third parties. No injustice or damage to any one can occur by upholding such a

practice. The rights of the bankrupts and the trustees are as fully protected as they are in controversies of the same kind between other persons.

There is nothing in the bankrupt act taking away, staying or limiting the jurisdiction of state courts to entertain such actions at any time, and so this court has said in Eyster v. Gaff and Burbank v. Bigelow. The trustee, when appointed, derives his title through a law of the country, and this title will be respected and protected in the state courts the same as that of any other person, and should be so respected, and the state courts have jurisdiction to enforce the rights of the trustee and protect them.

See Claflin v. Housman, assignee, 93 U. S. 130.

Under the present bankruptcy act, it seems to us there can be no question of the jurisdiction of the state courts to carry on such actions, and that in fact their jurisdiction of the controversies in regard to the right of possession of such property is *exclusive*, and under the decisions in Eyster v. Gaff, Burbank v. Bigelow, and McDonald v. Farwell, such right was recognized and enforced under the old bankruptcy act.

It is true that under the other acts some of the inferior federal courts before the decisions in Eyster v. Gaff and Burbank v. Bigelow, took a contrary view.

See In re. Vogel, 2 N. B. R. 427;
Same case, 3 N. B. R. 198;
In re. Steadman, 8 N. B. R. 319.

And these cases were cited by counsel on the other side in the court below, but they seem to be opposed to the doctrine of Eyster v. Gaff and Burbank v. Bigelow and Claflin v. Houseman, and certainly have no application under the present law.

After the decision in Eyster v. Gaff, the inferior federal courts seem generally to have followed a different rule, and to have upheld the jurisdiction of the state courts under the old bankruptcy act.

See Wente v. Young, 17 N. B. R. 90;
Leighton v. Harwood, 12 N. B. R. 360;

Also the earlier cases, Peiper v. Harmer, 5 N. B. R. 252; Wolfolk v. Murray, 10 N. B. R. 540.

The title of the bankrupt of the trustee in bankruptcy, and of the purchaser from the trustee is liable to be defeated at any time by the claim of an adverse party who has a better title than the bankrupt had. It is just as proper that this question should be determined in an action in a state court having jurisdiction against the bankrupt or the trustee, as in an action against their assignee, and the proper defendant in such action is the party in whom the title and possession was at the time of the commencement of such action.

In the case at bar the proper defendant in the state court was the bankrupt in whom the title and possession was when the action was commenced.

Unless there is something in the bankruptcy act limiting the jurisdiction of the state courts, it seems to us clear that they would have jurisdiction of such actions, and we find nothing in the act which in any way can be construed as limiting their right to proceed in, and decide such controversies; and what there is in the act in relation to such jurisdiction not only tends to strengthen their jurisdiction, but also demonstrates that they not only have jurisdiction, but have exclusive jurisdiction of such controversy.

5.

The third question certified, is **whether the property of the bankrupt, upon his adjudication in bankruptcy is** *in custodia legis* **of the bankrupt court, and can be taken possession of under process of the state court.**

The doctrine of *custodia legis* has been many times expounded in this court, and the general rule seems to be that the property is not in *custodia legis* until it is in the actual possession of the officer of the court. In Freeman v. Howe, 24 How. 453, the property was in the actual custody of the marshal who had seized it (see opinion, page 453). And in the still earlier case of Taylor v. Carryl, 20 How. 581, this court, on page 599, said: "It follows that to give jurisdiction *in rem*, there must have been a *valid seizure*, and *an actual control* of the ship by the marshal of the court." And in

Covel v. Heymen, 111 U. S. page 176, on page 179, this court says: "The point of the decision in Freeman v. Howe is that when property is *taken and held under process*, it is in the custody of the law," and further on it is said, "That it is the *possession* that cannot be disturbed." And on page 182, "The first levy, whether made under federal or state authority, withdraws the property from the reach of the process of the other." Counsel below argued that the decision of this court in Shields v. Coleman, 157 U. S. 168, was to the effect that the mere bringing suit was a sufficient seizure, but such is not the fact. The court there expressly stated that it was unnecessary to decide such question. (See page 177.)

Bankruptcy proceedings are instituted primarily for the purpose of adjudicating upon the question of bankruptcy, and upon the question of granting a discharge. Upon these questions, and the ordinary proceedings in bankruptcy, the jurisdiction of the bankruptcy court, when once invoked, is doubtless exclusive.

But the question of whether or not, by the filing of the petition or the adjudication of bankruptcy, the bankruptcy court obtains control of all property, including that claimed adversely, so that the same may be said to be *in custodia legis*, is a far different question.

In determining it, we must first consult the bankruptcy act which is said to bring this about.

The act itself does not contemplate any such thing. It proceeds upon the theory rather that until the appointment of a trustee the bankruptcy court is not in possession of the property. Thus we find that authority is given to the court, in chapter 2, section 2, subdivision 3, in special cases, to appoint receivers or marshals, in case the court shall find it absolutely necessary for the preservation of the assets, *to take charge of the property of the bankrupts.*

See also subdivision e. of section 3, and section 69.

Therefore the act contemplates that the court shall not have custody of the property, except in special instances, and in those instances provides how such charge shall be obtained, and that is in all cases *through an officer of the court*, a marshal, or receiver, or trustee.

So, it is provided in section 70 that the trustee of the estate of the bankrupt, upon his appointment and qualification, shall in turn be vested by operation of law with the *title of the bankrupt* as of the date he was adjudged a bankrupt.

That is, it is not contemplated that the title of the bankrupt shall be divested until the appointment and qualification of the trustee, and until the appointment of the trustee the title and possession remain in the bankrupt, unless some other court gains jurisdiction thereof.

It was held in Hampton v. Rouse, 22 Wall. 263, on page 275, under the provisions of the act of 1867, which are similar to section 70, "that until the assignee is appointed and qualified, and a conveyance or assignment is made to him, the title to the property, whatever it be, remains in the bankrupt, which is the plain meaning of the 14th section of the bankrupt act."

Thus the law contemplates that the only possession which the courts of bankruptcy shall have of the property shall be through their officers to-wit: marshal, receiver, or trustee, and the law provides no other way by which the court shall gain the custody of the property, or have it in its charge, except through the officers named, and under proper process or order in the case of a receiver or marshal, and under the law itself in the case of a trustee.

And if a marshal or receiver is not directed to take the property, or appointed to take it, and if a trustee is not elected, the court never gains the custody of the property, but the title and *possession* remain in the bankrupt.

It is true that the law of 1841 provided differently. (See Hampton v. Rouse on page 275).

Under the wordings of the act, and the decisions of this court in Hampton v. Rouse, it seems to us clear that the property cannot be said to be in *custodia legis* until seized by a marshal or receiver, or until the appointment of the trustee in the bankruptcy proceeding, and that until that time the title and right of possession remains in the bankrupts, though it may well be true that

the adjudication in bankruptcy is notice to any person dealing with the bankrupt, and that in so dealing with the bankrupt he will act at his peril, and liable to have the transaction avoided by the trustee thereafter appointed in a proper proceeding, but such rule in no wise affects the case at bar, for the right here claimed is one which could be exercised against the bankrupt or the trustee equally, and is in no wise impaired by the bankruptcy proceedings.

That is, by way of illustration, if A. owned a team of horses which are in B.'s barn for keeping; B. filed a petition in bankruptcy, and was adjudged a bankrupt, and scheduled the team as his; A. nevertheless would at any time, as against the bankrupt, or his trustee, have the right to retake his horses peaceably if he could, by a writ of replevin if necessary. Subject at all times to the right of the bankrupt and of the trustee when appointed, to appear in the action and dispute his claim; or if he had taken them without suit, to bring action against him for their value if he disputed his title. But if, on the other hand, B. being the owner of the two horses filed a petition and scheduled the property as his, and was adjudicated a bankrupt thereon, and before the appointment of a trustee sold them to C., the trustee, when appointed and qualified, would have the better title because by relation his title antedates that of the purchaser.

Bankruptcy proceedings can have no more effect upon the rights of an adverse claimant (one who claims the ownership of the property as against the bankrupt or his trustee) than a foreclosure proceeding against a mortgagee would have on a third party not a party to the action who claimed to own the premises adversely to the mortgagee's title, and yet the commencement of foreclosure proceedings is spoken of generally as notice to the world.

The point we make is that the determination of the ownership of the property is not a part of the *proceeding in bankruptcy*.

But all this in regard to the effect of the bankruptcy proceeding as notice is entirely different from the question of *custodia legis*. *That* under the wording of the act, and the decisions can only apply when the bankruptcy court, through its *officer appointed for that purpose, has taken possession of the property*.

The doctrine of *custodia legis* is only invoked in the aid of jurisdiction, and to prevent unnecessary and undignified contests between courts. If, therefore, the bankruptcy court has not jurisdiction under the present act to determine the controversy as to the title of the property replevined, then the reason, too, for the rule is wanting, and such, as we take it, is the situation here.

The state court has first obtained the actual possession of the property. It has not only jurisdiction, but exclusive jurisdiction to decide the controversy in relation thereto. It has not only the possession of the property, but jurisdiction of the parties. It would be a vain and idle formality which required the property to be returned to a court which could not decide the controversy in regard to it.

If such controversies are to be determined in the state courts in the same way they would have been determined *had bankruptcy proceedings not intervened*, then they should be decided in the same forms of action, and in determining the question of the title to personal property, the action of replevin is found particularly convenient and effective, and if the law is construed to mean, as we hold, that the state court has jurisdiction to decide the controversy, then as *a necessary part of that jurisdiction it must be allowed to determine the possession of the property*, and it must be allowed to proceed in accordance with the ordinary and usual forms of procedure, and in replevin actions it must be allowed to take for the purpose of deciding the controversy in regard to the title, *the possession of the property*, that its judgment may in the usual and ordinary form award the possession of that property to the proper party.

If it did not take the property, its judgment would be a nullity; it would not possess the right of enforcing its own judgment.

Our opinion is that under the present bankruptcy act the trustee, when appointed, stands merely as one clothed by the law with the title of the bankrupt, and that as such trustee he is liable to be sued by adverse claimants as any other person would be sued, or as the law puts it, *in the same courts where proceedings would have been brought had bankruptcy not intervened.*

That in this making him subject to the same courts and same proceedings *where adverse interests are concerned* as the bankrupt himself would have been, the law has acted most wisely.

The possession which he then holds is somewhat analogous to that of assignee under the voluntary assignment and insolvency laws of different states, and in such cases controversies of this kind are determined in actions at law in any court having jurisdiction of such actions. And in respect to such controversy the assignee sues or is sued the same as if he were a private individual, and not an officer of the court. Such, in fact, is the common practice in such cases, and it is the practice because experience has shown that in such actions only, can the rights of the parties be speedily and accurately determined, and the right of trial by jury be preserved, and as typical of this class of cases we call the court's attention to the following:

John V. Farwell Co. v. Hilton, assignee, 84 Fed. Rep. 293;
Bussing v. Rice, messenger in bankruptcy, 2 Cush. 48;
Farley v. Lincoln, assignee, 51 N. H, 577.

These cases are cited, not because the right to sue a trustee in bankrupty was in any way there considered, but because they show what the status of the officer holding what seems to be an analogous position is under the law of different states, and to a certain extent will perhaps serve to convey to Your Honors our idea of the status of the trustee in bankruptcy under the present act in respect *to adverse claimants.*

In the court below, counsel on the other side seemed impressed with the fact that because section 70 provides that the title of the trustees shall relate back to the date of the adjudication, that thereby the property became in *custodia legis* of the date of the adjudication. That this is not so was held by this court in Hampton v. Rouse, under the provisions of the law of 1867, which in that

respect were similar. But this provision of relation, is merely the common doctrine of *title by relation.*

It does not mean that the trustee shall have any possession by operation of law, but merely that he shall succeed to the title as distinguished from the possession which the bankrupt had. There is a vast difference between title and possession, and the fact that by relation the title dated back to the date of the adjudication is not the same as possession going back to that time. The provision which by operation of law makes the title of trustee relate back is an old fiction of the law, and is common in statutes relating to *executors, administrators, assignees and other officers.*

And as the supreme court of Wisconsin has said in the case of Hayden v. Roe, 66 Wis. 291: "The whole doctrine of relation is but a fiction or device of the law, and is hedged with limitations," and in Jac. Law Dictionary, under the head of "Relation," it is said: "This device is most commonly to help acts in law and make a thing take effect, and shall relate to the same thing, the same intent and *between the same parties only*, and it shall never do a wrong or lay a charge *upon a person that is no party.*"

This provision of title by relation is to enable the trustee to recover on a cause of action arising before his appointment, which he might not be able to do if the title only vested in him upon his appointment, and that is as far as it is ever necessary to extend the doctrine.

As we have said, it is the title only of the trustee which relates back, and it is only the *title of the bankrupt*, and if the bankrupt had no title, or if the lawful owner be in possession of the property when the trustee is appointed, or if a person claiming to be the owner be in possession when he is appointed, then though the trustee's title may relate back to the date of the adjudication, and enable him to litigate *the question* the same as the bankrupt might have done, yet there is nothing in the law which extends his *possession* back to the date of the filing of the petition or of the adjudication, and if he desires to question the

right of possession, or possession of such adverse claimant, he must do it in an action in the proper court.

If there arises in this case at all a question of *custodia legis* then, under the decisions it must be held that the state court, by proceeding in replevin *wherein it actually seized under the process of its court the property in controversy*, has obtained *custodia legis*, or perhaps better, that the property is now in *custodia legis* of such court.

This court, in a case which is somewhat similar to the case at bar, have settled that the doctrine of constructive possession can have no application here.

See Moran v. Sturgis, 154 U. S. 256.

In Moran v. Sturgis, a proceeding was commenced in the state of New York for the dissolution of a corporation, and on the 31st day of July the state court *appointed a receiver*. The order appointing the receiver and accompanying papers were filed in the state court in the forenoon of August 1. On the afternoon of August 1, and on August 3, Michael Moran and others filed libels in admiralty, in the district court of the United States for the eastern district of New York, against certain steamboats, the property of the corporation, and process was issued under the libels to the United States marshal for that district, and on August 1 he seized certain steamboats, and the balance on August 3. It was contended before this court in that case, that the state court, by virtue of the receivership proceedings, and the appointment of a receiver, gained *constructive possession* of the property, and that the same was therefore *in custodia legis*, and not subject to seizure by the marshal. This court held that inasmuch as the receiver had not filed his security when the marshal seized the boats, the property was not in the custody of the state court, and this court said, on page 284: "At the time these libels were filed and the marshall seized the property, it had not been developed whether or when the receiver would or might give the security required and enter upon the discharge of his duties, *and he had neither actual nor constructive possession.*"

And in our case it may equally well be said, that when the state court took possession in the replevin proceeding, it had not developed whether or when a trustee would be appointed, or whether any would be appointed, or when he would enter upon the discharge of his duties. The case at bar is stronger than the case before this court in Moran v. Sturgis, because there a receiver had been appointed.

In our case *the trustee had not been appointed*, when the proceedings were brought, and what in that case was said in regard to the jurisdiction of the district court in admiralty, may be said of the jurisdiction of the state court in the replevin action in the case at bar, its jurisdiction was not concurrent with that of the bankruptcy court, but it was proceeding in the exercise of its jurisdiction to *determine a controversy* which the bankruptcy court, under the present bankruptcy act, had no jurisdiction to determine, and being first in the *actual possession* of the property, under the decision in Moran v. Sturgis, it should be held that the state court had jurisdiction, and that it is entitled to proceed in such action.

The Ironsides, 4 Bissell, 518.

In re. Chatwood, 165 U. S. 443, the bankruptcy court, though its trustee takes only the title of the bankrupt, it can sell only his title, and a sale by the trustee of property would in no way divest the real owner of his title. Bankruptcy courts can not determine such controversies unless jurisdiction is expressly granted them, for it is no part of the bankruptcy proceedings.

We can see nothing upon which to found an argument that the property was in *custodia legis* of the bankrupt court.

The conferring of *jurisdiction* on the state courts by the bankruptcy act, must be held to confer also the *authority to exercise* such jurisdiction, and therefore as against such court in the exercise of its exclusive jurisdiction to determine such controversy, it cannot be said that the property is *in custodia legis* of the bankruptcy court; otherwise we would have this predicament, one court claiming custody and denying the right of another court to interfere, while it has not the power itself to determine the controversy, and the other court with the power to determine the controversy with-

out the power to interfere. Such a state of things should not be permitted.

If the bankruptcy act confers on the state courts and the circuit courts of the United States in particular cases jurisdiction to determine such controversies, it must by necessary implication confer upon them the right to do all things necessary to carry out such jurisdiction, and must of necessity authorize and empower them to issue process against the bankrupts, or their trustee, and to issue process for the bringing into their control of the property in dispute, so that they can by their proper order or judgment determine to whom it shall go.

That construction of the law should be adopted which most clearly harmonizes its different provisions, while giving effect to all, and if the law be construed to mean that the trustee, though an officer of the court, in the eyes of the law stands as a person vested with the title of the bankrupt, and that the possession of the property in his hands is his possession, and not the custody of the court appointing him, and that he is liable, in regard to adverse claims to the property in his hands, to sue and be sued the same as the bankrupt could have sued or been sued, with the additional rights granted him of avoiding fraudulent transfers made by the bankrupt, then we have a construction of the law which will harmonize and protect the interests of all.

Where the tsustee thinks he is entitled to property adversely claimed, he must maintain his suit at law in the same courts the bankrupt would have been obliged to bring it, and where persons contest with him adversly the title to property in his hands, they can proceed against him in the proper state court or in the circuit court of the United States; that is, as to all adverse claims, the trustee stands as a private individual, insofar as his right to sue or be sued is concerned. As to other matters strictly bankruptcy proceedings, like the distribution of assets, or the determination of equities or liens, the jurisdiction is in the bankruptcy court to be exercised upon the application of the trustee or other interested parties.

There can at this time be little question of the ability and fairness of state courts to determine these controversies. However, if it should appear for any reason that the state courts act unfairly in the matter, or that there is unnecessary feeling between the courts, then it is for Congress to give jurisdiction of such adverse controversies to the bankruptcy courts. The question is not which courts can best determine the controversy, but the question is, *what courts has Congress determined shall decide such questions*. And the intent of the law clearly is to leave questions of adverse ownership to the state and United States circuit courts.

THE LAW ITSELF DISPOSES OF THE QUESTION OF CUSTODIA LEGIS.

If the doctrine of *custodia legis* has any application, the law itself has waived it by permitting such controversies to be determined in state and United States circuit courts. The courts always have had power to permit their officers to be sued, and of course Congress had ample power to so provide by law. And in giving to state courts jurisdiction of controversies with adverse claimants it has taken from the bankruptcy courts the right to resist any such jurisdiction under the claim of *custodia legis*. In the same way Congress has provided for such suits against receiver of federal courts in state courts without leave of the court appointing them.

If by the bankruptcy act itself jurisdiction of controversies with adverse claimants is given to the state court, is it not absurd to say that the commencement of bankruptcy proceedings under the act prevents the exercise of such jurisdiction?

The controversy here is whether the bankrupt had any interest in this property, whether there was any title to pass to the trustee, or any interest in the property for the bankruptcy court to act on in bankruptcy proceedings. This question was under the old law to be decided by the court first taking jurisdiction for that purpose. Under the present law, it is to be decided by the state or United States circuit court in a proper action. And the true rule seems

to be that the bankruptcy court acquires no custody of the property except through the taking possession thereof by its proper officers, towit: marshals, receivers, or trustees. That when property claimed adversely by third parties is in the possession of its trustee, it is not in *custodia legis* so as to prevent the jurisdiction of state courts, or the circuit courts of the United States attaching for the purpose of determining controversies between such trustee and adverse claimants as to the ownership of such property; and adjudging its delivery to the person determined to be the owner thereof. For such jurisdiction is given by the law creating the bankruptcy courts, and their jurisdiction is at all times limited by the terms of the act, and cannot be extended so as to defeat the jurisdiction of other courts whose jurisdiction is expressly recognized by the act. The law itself has waived any application of the doctrine of *custodia legis*, and has expressly authorized and empowered other courts to adjudicate upon controversies with *adverse claimants* as to the ownership and possession of property.

In conclusion we respectfully submit that:

1. The controversy herein is with an *adverse claimant*.

2. That the state and United States circuit courts have *exclusive* jurisdiction of such controversy.

3. That the trustee in such controversy has no better title than the bankrupt.

4. That under the old law the bankruptcy court had no authory to decide such controversy in a summary proceeding; and under the present law has no jurisdiction to decide such question or retake the property in any proceeding *unless with the consent of the adverse claimant*.

5. That under the bankruptcy act of 1867 actions were properly commenced against the bankrupt to recover property (Burbank v. Bigelow)and under the present law can be so commenced and prosecuted.

6. That there is nothing in the present law to prevent actions against the bankrupt after adjudication, and in actions brought by adverse claimants to recover property under claim of

ownership the proper defendant is the person in possession, be he bankrupt or trustee.

7. That the bankruptcy court does not acquire custody or control except through the acts of its marshals, receivers, or trustees in taking possession of the property.

8. That in such cases the trustee takes only the title of the bankrupt liable to be defeated at any time by an adverse title.

9. That the property, as to adverse claimants, by the terms of the act itself, is never *in custodia legis* so as to prevent such claimants contesting such rights in state or U. S. circuit courts.

10. That such courts have jurisdiction by the wording of the act and that the grant of such jurisdiction implies the right to exercise it in the usual way, by taking possession and awarding possession to the person entitled thereto.

11. That the state court has obtained jurisdiction both of the necessary parties and of the subject matter of the controversy in the case at bar.

12. That if the trustee desires to litigate with the adversr claimant the question of title, he should under the provisions of the bankruptcy act be made a party to the action in state court, or perhaps bring an independent action there.

And that to the questions certified to this court in this proceeding, the following answers should be returned:

First. The district court sitting in bankruptcy has no jurisdiction, by summary proceedings, to compel the return of the property seized.

Second. After adjudication in bankruptcy, an action by an *adverse claimant* can be commenced and maintained in state court against the bankrupts to recover property in their possession and claimed by them at the time of the adjudication.

Third. Upon the adjudication of bankruptcy, the property of the bankrupt is not in *custodia legis* of the bankruptcy court, and it may be taken possession of under process of the state court in an action brought by an *adverse claimant*.

CHARLES W. FELKER,
Counsel for Petitioners.

JOHN C. THOMPSON,
Of Counsel.

Filed April 24, 1901

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1900.

No. 330.

CHARLES M. WHITE, JOHN C. THOMPSON and HENRY EGGERTON, Petitioners,

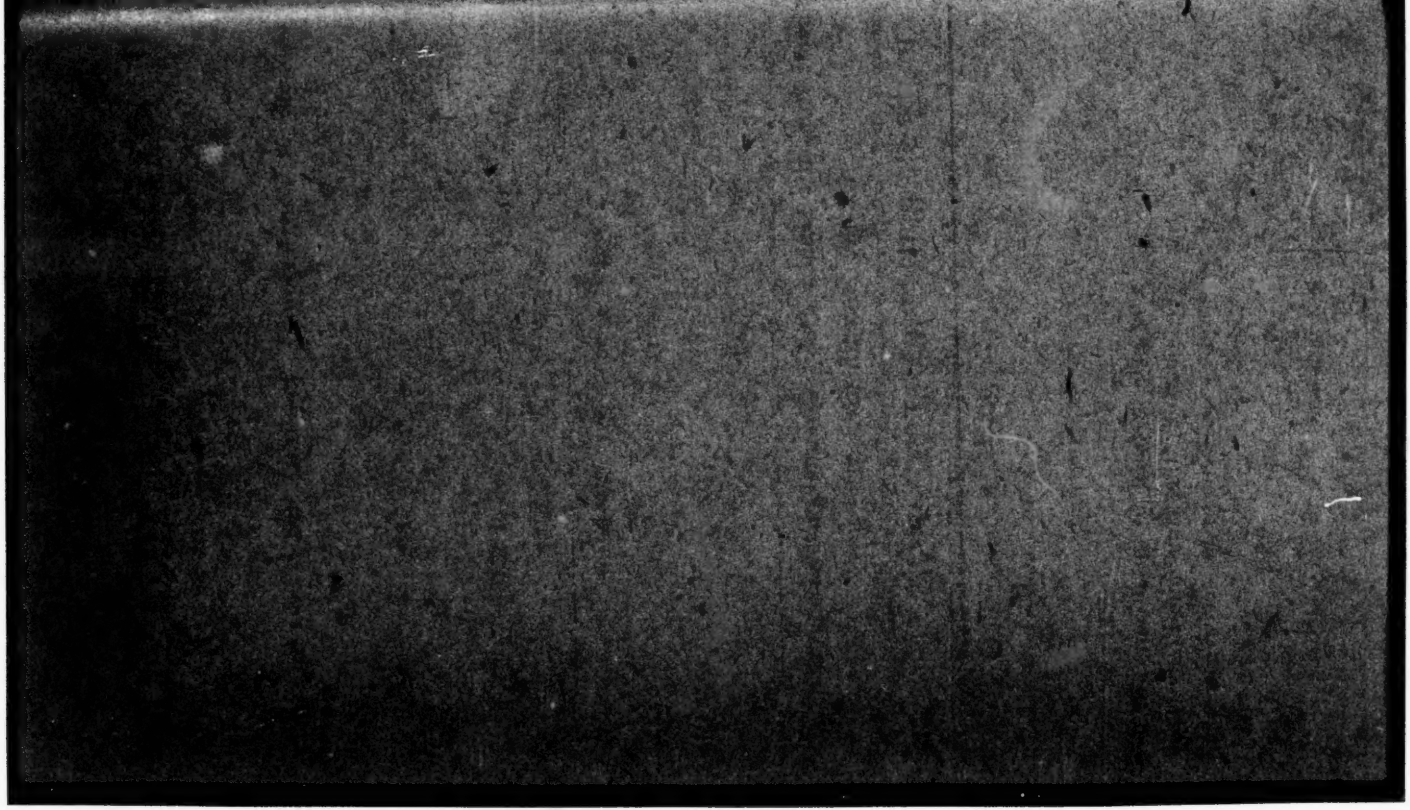
vs.

AUGUST T. SCHLOSSER, EUGENE B. SCHICKEBANTZ and HARRY ROBERTS, Trustee, Respondents.

Certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF IN BEHALF OF RESPONDENTS.

(17,644)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 530.

CHARLES M. WHITE, JOHN C. THOMPSON and HENRY ECKSTEIN, Petitioners,

vs.

AUGUST T. SCHLOERB, EUGENE B. SCHICKEDANTZ and HENRY ROKNITZ, Trustee, Respondents.

Certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

RESPONDENTS' BRIEF.

Questions certified to this Court:

First. Whether the District Court, sitting in bankruptcy, had jurisdiction by summary proceedings to compel the return of the property seized.

Second. Whether, after adjudication in bankruptcy, an action in a state court can be commenced and maintained against a bankrupt to recover property in the possession of and claimed by the bankrupt at the time of the adjudication.

Third. Whether the property of a bankrupt upon his adjudication in bankruptcy is in custodia legis of the bankrupt court and can be taken possession of under process of a state court.

BRIEF OF ARGUMENT.

The second and third questions certified to this Court will be first considered, as they are practically the same question. The answer of the second question would seem to be decisive of the third, which cannot be answered "yes" or "no." It will be considered under five heads.

First. Provisions of bankrupt law.

Second. General principles of jurisdiction.
Third. Decisions under former bankrupt acts.
Fourth. Decisions under present bankrupt act.
Fifth. Further aspects of the question.

I.

Bankrupt law of 1898, Section 2. The district courts of the United States in the several states * * * * * are hereby made courts of bankruptcy, and are hereby invested within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law AND IN EQUITY as will enable them to exercise original jurisdiction in bankruptcy proceedings in vacation, in chambers and during their respective terms, as they are now or may be hereafter held, to (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow them, against bankrupt estates. (3) Appoint receivers or the marshals upon application of parties in interest in case the courts shall find it absolutely necessary for the preservation of estates, to take charge of the property of the bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified. (6) Bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy. (7) Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided. (13) Enforce obedience by bankrupts, officers and other persons, to all lawful orders by fine, or imprisonment, or fine and imprisonment. (15) Make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act.

Section 2, last clause. Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated

By Section 7 the bankrupts are put under legal obligation to

assist the trustee in every manner to collect the assets of the estate, and see that they are properly distributed. The bankrupt is to examine all proofs of claim, execute and deliver all papers ordered by the court, and transfer all property in foreign countries, inform the trustee of any attempt of creditors to evade the act, or of any persons to prove a false claim, etc.

By Section 22a the bankruptcy court may immediately after a person has been adjudged a bankrupt, refer the cause to the referee with general powers to proceed with the administration of the estate.

By Section 29b it is provided that a person shall be punished by imprisonment upon conviction of the offense of having knowingly and fraudulently (subdivision 4) received any material amount of property from the bankrupt after the filing of the petition, with intent to defeat the act.

By Section 47 trustees are to collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest.

Section 67 provides that all liens created by or obtained in any suit or proceeding at law or in equity including an attachment upon mesne process * * * * * * which was begun within four months before the filing of the petition by or against such person, shall be dissolved by adjudication of bankruptcy. And further provides that all conveyances, transfers, or assignments of property of bankrupt within four months prior to the filing of the petition shall be void, and same be and remain a part of the assets of the estate of a bankrupt; and shall pass to the trustee, whose duty shall be to recover and reclaim the same. Furthermore the court may order persons obtaining such attachments and liens to make such conveyances as shall be necessary to carry the act into effect.

Section 70 provides that the trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or suc-

cessors, if he shall have one or more, upon his appointment and qualification, shall in turn be vested by operation of law with the title of bankrupt as of the time he was adjudged a bankrupt. This includes (5) property which, prior to the filing of the petition, he could by any means have transferred. And subdivision 25 of Section 1 of the bankrupt law declares that the word "transfer" shall include selling, conveying, or parting with property.

It will thus be seen that the most stringent and far-reaching provisions have been made for reducing the possession of the bankrupt's estate to the district court and its officers, and for the trustee's recovering possession of every species of property from anybody having the same in possession, and for the collection of assets, and for a speedy, inexpensive administration of the entire estate in the district courts of the United States, which are alone courts of bankruptcy.

II.

GENERAL PRINCIPLES OF JURISDICTION.

It will be noticed, first, that Schloerb & Schickedantz were declared bankrupts by the court many days before the action of replevin was begun in the state court. Second: that by virtue thereof the bankrupt court and its officers were in possession of the stock of goods replevined, holding the same as a part of the bankrupt estate. That is, the district court of bankruptcy acting in rem, had possession of the res. This fact brings the case directly within the well known principle of law and equity that the court which has jurisdiction of the res will retain jurisdiction thereof for all purposes and make a final adjudication among all claimants thereto. We respectfully submit that that principle is controlling in this case. Nowhere has it received a fuller and more complete exposition than in the federal decisions.

Among the first of these is the case of Hagan vs. Lucas, 10 Peters, 400. Slaves, claimed to be the property of B. and D., were levied on under an execution upon judgments of a court of the state of Alabama. After being so levied on by the state officers,

the marshal of the United States District Court also levied upon the same slaves on a judgment of the federal court, against the same persons. It was held that the levy of the marshal was void. The first levy, whether it is made under the federal or state authority, withdraws the property from the reach of the process of the other. A most injurious conflict of jurisdiction would be likely, often, to arise between the federal and the state courts, if the final process of the one could be levied on property which had been taken by the process of the other. Property once levied on remains in the custody of law and it is not liable to be taken by another execution in the hands of a different officer, and especially by an officer acting under a different jurisdiction.

It is said in Peck vs. Jenness, 7 Howard, 612, that "it is a doctrine of law, too long established to require the citation of authorities, that where a court has jurisdiction, it has a right to decide every question which occurs in the cause. And that right cannot be arrested or taken away by proceedings in another court. Neither can one take property from the custody of the other by replevin, or any other process."

In Shawham vs. Wherritt, 7 Howard, 627, a creditor, with knowledge of conduct amounting to an act of bankruptcy, attempted, by a creditor's suit in state court, to obtain a lien on the property of the bankrupt. In a suit in a district court by assignee afterwards appointed, it was held that the bankrupt law made the state proceedings void, and the court decreed that the property or its proceeds should be turned over to the assignee. See also the case of

Williams vs. Benedict, 8 Howard, 107.

In Wiswall vs. Sampson, 14 Howard, 52, it was held that where one has a judgment lien on land, in possession of a receiver, he cannot proceed to levy his execution, but must come into the court having custody of the land. His remedy is in the court of chancery, which will take care to direct a proper distribution of the funds. When a receiver has been appointed, his possession is

equal to that of the court, and any attempt to disturb it without leave of the court first obtained will be a contempt on the part of the person making it. The court quote from Daniel on Pleading and Practice in Chancery, as follows: "The proper course to be pursued by any person who claims title to an estate or other sequestered property, whether by mortgage or judgment liens or otherwise, or who has a title paramount to the sequestration, is to apply to the court to direct the plaintiff to exhibit interrogatories before one of the masters, in order that the party applying may be examined as to his title to the estate. An examination of this sort is called examination pro interesse suo; and an order for such an examination may be obtained by the party interested as well where the property consists of goods and chattels or personalty, as where it consists of real estate." And "where sequestrators are in possession under a process of the court, their possession is not to be disturbed even by an adverse title, without leave. Upon this principle that the possession of the sequestrators is the possession of the court, and the court being competent to examine the title, will not permit itself to be made a suitor in a court of law but will itself examine the title."

See Daniel's Chancery Pleading and Practice, vol. 2, 4th Ed., page 1057, 1058, 1059.

Peale vs. Phipps, 14 Howard, 369.

Taylor vs. Carryl, 20 Howard, 583, held, that where a vessel has been seized under a process of attachment in a state court, and is in the actual custody of the sheriff, no valid seizure of her can be made so as to give jurisdiction in proceedings in rem in the admiralty courts of the United States. The court says the court of chancery does not allow the possession of its receiver, sequestrator, committee, or custodee to be disturbed by a party, whether claiming by title paramount or under the right which they were appointed to protect. Hagen vs. Lucas, 10 Peters, 400, cited with approval.

See also Harris vs. Dennie, 3 Peters, 292.

In the leading case of Freeman vs. Howe, 24 Howard, 450, the marshal attached certain railroad cars in a suit against the railroad company in the United States Circuit Court, which cars were afterwards taken out of his hands by the sheriff of a state court under replevin process; the plaintiffs in the state court claiming to be the mortgagees of the property. It was held that the state process was void. Practically the same argument was made in that case as has been made by the petitioners here. "Another and main ground relied on by the defendants in error is that the process in the present instance was directed against the property of the railroad company, and conferred no authority upon the marshal to take the property of the plaintiffs in the replevin suit. But this involves a question of right and title to the property under the federal process, and which it belongs to the federal, and not the state courts, to determine."

Speaking of the case of Slocum vs. Mayberry, 2 Wheat., 2, the court quoted Chief Justice Marshal as follows: "Any interference of a state authority, which, by taking the thing seized out of the possession of the officer of the United States, might obstruct the exercise of this jurisdiction, would unquestionably be a violation of the act, and the federal court having cognizance of the seizure might enforce a re-delivery of the thing by attachment or other summary process, against the parties who should divest such a possession. The party supposing himself aggrieved by a seizure cannot, because he considers it tortious, replevy the property out of the custody of the seizing officers, or of the court having cognizance of the cause." Furthermore the court goes on to show what the proper remedy is. Page 460.

See also Buck vs. Colbath, 3 Wall., 334.

Krippendorf vs. Hyde, 110 U. S., 276.

In that case the former decisions are examined at length, and Freeman vs. Howe is given emphatic approval. The proper practice for adverse claimants to res in custodia legis is also explained.

In Covell vs. Heyman, 111 U. S., 176, the marshal having seized certain personal property under execution issued upon a judgment of the United States Circuit Court, the defendant in error brought an action of replevin in state court to recover same from the marshal. Upon writ of error to Supreme Court of Michigan, it was held that the action of replevin should be dismissed. The previous cases are examined and reaffirmed, the court saying the United States courts and state courts do not belong to the same system, so far as their jurisdiction is concurrent, and although they co-exist in the same place, they are independent and have no common superior. And when one court takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void.

Chapman vs. Brewer, 114 U. S., 158.

In Heidritter vs. Elizabeth Oil-cloth Co., 112 U. S., 294, the effort to foreclose a mechanics lien in a state court after seizure of the res by the marshal of a United States Court, was held vain, nugatory and void.

Porter vs. Sabin, 149 U. S., 473, is to the same effect. "When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, the court assumes the administration of the estate. The possession of the receiver is the possession of the court. Any claim against the receiver, the court may permit to be put in suit in another tribunal against the receiver, or may reserve to itself the determination of; and no suit, unless expressly authorized by statute, can be brought against a receiver without the permission of the court which appointed him. Page 479.

See also In re. Chetwood, 165 U. S., 443.

Appleton Water Works Co. vs. Central Trust Co., 93 Fed. Rep., 286.

Patterson vs. Mater, 26 Fed. Rep., 31.

Shields vs. Coleman, 157 U. S., 168, where it is said that seizure is not necessary in order that the court may get jurisdiction over the res. It may be obtained by actual seizure and may be done by a mere bringing of the suit, in which the claim is sought to be enforced, and which may by law be equivalent to a seizure, being the open and public exercise of dominion over it for the purpose of the suit. This brings us to that set of cases establishing beyond doubt the principle that

ALL THE PROPERTY IN THE POSSESSION OF THE BANKRUPT AT THE TIME OF THE ADJUDICATION AND CLAIMED BY HIM TO BE HIS PROPERTY, COMES INTO THE CUSTODY OF THE BANKRUPT COURT UPON THE ADJUDICATION OF BANKRUPTCY.

A proceeding in bankruptcy is a proceeding in rem. The adjudication of bankruptcy against Schloerb & Schickedantz acted as an attachment of their estate. All property afterwards replevied by Cogan & Son was at time of bankruptcy in the lawful possession of the bankrupts, who claimed title thereto. Upon being adjudicated bankrupts, they closed and locked the store, under the direction of Charles H.Forward, referee in bankruptcy. The moment Schloerb & Schickedantz were declared bankrupts, all their stock of goods was in custodia legis of the bankrupt court.

After the case was referred to the referee it was his duty to see that the store was locked and he was bound to preserve the estate until the trustee should qualify. It was his imperative duty to do so.

Under the act of 1867, Justice Blatchford in the United States District Court for the Southern District of New York, in the case of In re. Hasbrouck, 1 N. B. R., 75, held that a register is authorized and required, upon the request of a voluntary bankrupt, to receive the surrender of all his property and safely keep it until turned over to the assignee. This ruling was approved in the cases of In re. Bogart and In re. Shafer, 2 N. B. R., 585, 586.

As is said In re. Brinkman, 7 N. B. R., 421, 428, "The com-

mencement of proceedings in bankruptcy at once transfers to the district court the jurisdiction over the bankrupt, his estate, and all parties and questions connected therewith, and operates as a supersedeas of all process in the hands of the sheriff of a state court. The filing of a petition in bankruptcy at once brings the property of the insolvent into the bankrupt court, and places it in its custody, and under its protection, as fully as if actually brought into the visible presence of the court. Being in the custody of the court, no other court can, without the permission of the court in bankruptcy, interfere with it; and to so interfere is a contempt of the bankrupt court. I have examined all the authorities I can find upon this question, and find that Judges Chase, Clifford, and Field of the Supreme Court of the United States, hold the same view of the law; and that all the district judges also decide in the same manner; and the only opinion to the contrary is the opinion In re. Campbell." In that case the mortgagee was enjoined from foreclosing in a state court a mortgage on bankrupt's property. The opinion is by a referee but it approved by Judge Blatchford, see numerous authorities cited therein.

The same doctrine is laid down by Judge Erskine in In re. Steadman, 8 N. B. R., 319, where that Judge says, "From the hour S. filed his petition in bankruptcy, he was divested of his estate, real and personal, in possession or in action, and the estate, by operation of the bankrupt law, must be considered in custodia legis as fully, indeed, as if the court had the prehensory power over it. It was the duty of the bankrupt to protect and preserve estate for the benefit of his creditors, and apply to the bankrupt court for such remedy as may avert an approaching wrong. The following are to same effect:

Phelps vs. Sellick, 8 N. B. R., 392, 394. In re. Anderson, 9 N. B. R., 360.

Federal Cases No. 351.

Hewett vs. Norton, 13 N. B. R., 279.

Byrd vs. Harrold, 18 N. B. R., 436.

Hudson vs. Schwab, 18 N. B. R., 482, et seq.

Jones vs. Leach, 1 N. B. R., 595.

In this case the court not only had constructive possession of the res of the bankrupt from the moment of the adjudication, but the court also, through its referee, and through the bankrupt himself, acting for the referee and for the court, took actual possession of the res.

Actual possession of the res, however, was not necessary in order to put the thing in custodia legis. The court which first takes jurisdiction of a controversy and the parties is entitled to retain it to its final termination; and also to take possession of the res, subject of the controversy, exclusive of all interference from any other court. And it is not essential that the court first taking jurisdiction of the controversy should also first take the actual possession of the res.

Gaylord vs. Ft. W. M. C. R. R. Co., 6 Bissell, 286.

There it was held, a creditor's bill being filed in the United States Court before a similar creditor's bill was filed in a state court, although the state court first took actual possession of the res, that the United States Court had exclusive jurisdiction thereof. Judge Drummond says that the controlling principle is this: "That the court which first takes cognizance of the controversy is entitled to retain jurisdiction to the end of the litigation, and incidentally to take possession or control of the res. Judges Hopkins and Blodgett concurred. This is quoted with approval in High on Receivers, pages 38, 41.

A creditor's bill acts as a lis pendens and gives jurisdiction of person and subject matter.

Miller vs. Sherry, 2 Wallace, 237.

Crittenden vs. Brewster, 2 Wallace, 191.

Such a suit amounts to an equitable levy.

Central R. R. Co. vs. Peters, 113 U. S., 124.

Union Trust Co. vs. R. R. I. Co., 6 Bissell, 197.

The court first acquiring jurisdiction, its power being adequate to the administration, should retain its jurisdiction and confine the litigation to that forum.

Conover vs. Mayor, 25 Baarbour, 513.
Ex parte Bushnell, 8 Ohio St., 601.

We beg to call your Honors' attention to the case of Atlas Bank vs. Nahant Bank, 23 Pickering, 481. On July 7th, 1838, a creditor's bill was filed in one of the state courts of Massachusetts, against the Nahant Bank, praying for receivers, etc., and an injunction. On August 17th, the petitioners were appointed receivers by the court. It appeared that after the filing of the bill and issuing of the injunction, but before the actual appointment of receivers, to-wit: about the 21st of July, the respondents made their attachment of real estate of the Nahant Bank, for debts alleged by them to be due. The receivers petitioned for an order dissolving and restraining respondents from proceeding on their attachments. Granted. Opinion is by Chief Justice Shaw. We call especial attention to what that learned Judge says on page 489 in regard to the receivers thus appointed as being applicable to the office of trustees under the present bankruptcy act. And speaking of the effect of the creditor's bill he says: "And the court are of opinion that the sequestration intended to be made by force and operation of this statute for the benefit of all creditors by one general process, must be considered as taking effect not merely from the time of the appointment of receivers, which is an incidental step in the proceeding, but from the institution of the proceeding by the filing of the bill, or at least by the act of the court sustaining it, by the issuing of an injunction."

See also Bell vs. Ohio Life and Trust Co., 1 Bissell, 260, and Adams vs. the Mercantile Trust Co., 66 Fed. Rep., page 621, and the cases there cited.

Not only is the adjudication of bankruptcy a decree in rem, but, as was said by Mr. Justice Swayne in Bank vs. Sherman, 101 U. S., 403, "The filing of the petition was a caveat to all the world. It was in effect an attachment, and an injunction."

Counsel for petitioners seems to have been under the impression that the position of the trustee in bankruptcy is analogous to that of an assignee under the insolvent laws of a state; and has so claimed in former arguments of this case. This is a vital error. A trustee in bankruptcy is, (1) appointed by the court in a proceeding distinctly in rem. (2) In a proceeding under the supreme law of the land. (3) In a court by express enactment a court of equity. (4) Like a receiver in chancery, who takes by operation of law, and not through the instrumentality of a deed. White vs. Ewing, 159 U. S., 39. He is something more than a receiver in chancery. Atlas Bank vs. Nahant Bank, 23 Pickering, 489.

An assignee under insolvent laws is merely a transferee under a common law deed.

IV.

DECISIONS UNDER FORMER BANKRUPT ACTS.

In many respects the bankrupt act of 1841 closely resembles the present bankrupt act, although it contained fewer provisions for giving absolute control to the bankrupt court than are found in the present law. The question of the true nature and extent of the jurisdiction of the district court, sitting as a court of bankruptcy, was fully and ably treated and discussed by Justice Story in the case of

Ex parte Christy, 3 Howard, 308.

That case was an application to this court for a writ of prohibition to prohibit the district court of the United States for the district of Louisiana from further proceedings in a case in bankruptcy, where that court had on petition enjoined foreclosure proceedings in a state court. Justice Story held that the district court, sitting in bankruptcy, had jurisdiction over liens and mortgages, and to inquire into their validity, and to enjoin proceedings in state courts by acting upon the parties through injunction or other appropriate proceedings in equity. Mr. Justice

Story says, "The obvious design of the bankrupt act was to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period. For this purpose it was indispensable that an entire system, adequate to that end, should be provided by congress, capable of being worked out through the instrumentality of its own courts, independently of all aid and assistance from any other tribunal over which it could exercise no effectual control." And again, "It is manifest that the purpose so essential to the just operation of the bankrupt system could scarcely be accomplished except by clothing the courts of the United States, sitting in bankruptcy, with the most ample powers and jurisdiction to accomplish them. We entertain no doubt that under the provisions of the sixth section of the act, the district court does possess full jurisdiction to suspend or control such proceedings in the state courts by acting on the parties. Such a course is very familiar in courts of chancery in cases where the creditor's bill is filed for the administration of the estate of a deceased person, and it becomes necessary or proper to take the whole assets into the hands of the court for the purpose of collecting priorities, and claims, and accomplishing a due and equitable distribution among all parties in interest in the estate. On pages 319 and 320 Justice Story shows what would be the effect of a doctrine that numerous suits could be brought in different state courts, and shows that such a course might cause irreparable damage to the creditors of the bankrupt. "If we are told that resort may be had to the state courts for redress, one answer is that in some of the states no adequate jurisdiction exists in the state courts, since they are not clothed with general jurisdiction in equity; but a stronger and more conclusive answer is that congress did not intend to trust the working of the bankrupt system solely to the state courts of twenty-six states, which were independent of any control by the general government, and were under no obligations to carry the system into effect. The judicial power of the United States is by the constitution competent to all such purposes, and congress by the act intended to secure the complete administration of the whole system in its own courts,

as it constitutionally might do." The able opinion might be quoted at great length as being directly in point on this argument.

As said in Hudson vs. Schwab, 18 N. B. R., 482, speaking of the effect of the doctrine that the state courts had full jurisdiction in all such matters: "The settlement of an estate may be delayed by frivolous appeals, or by new trials, or wasted in fruitless litigation. The assignee may rely upon defenses peculiar to the bankrupt law and not available to him in the state courts. Should such defenses be improperly overruled, and it is safe to assume that such cases will occur, the assignee is remedyless except by an appeal to the supreme court of the United States, involving tedious delays and great expense."

The decisions in point under the bankrupt act of 1867 are extremely numerous. A few of these will be cited. In in re. Barrow, 1 N. B. R., 481, a petition by assignee to sell real estate free and unencumbered, Durrell, J., said, "The estate surrendered is placed in the custody of the court sitting in bankruptcy. No court of an independent state jurisdiction can withdraw the property surrendered, nor determine in any degree the manner of its disposition. The powers of the bankruptcy court extend to a suspension of proceedings taken for the purpose of subjecting portions of the estate surrendered to a sale under state process."

In in re. Vogel, 2 N. B. R., 427, (Quarto 138), the petition in voluntary bankruptcy was filed on the 5th of October, 1868. On the 6th of October the petitioner surrendered his property to the register to whom the case was referred. Thereafter, on the same day, the sheriff, under process of replevin, brought against the petitioner in the Supreme Court of the state of New York, by Thomas & Co., took from the store certain goods and merchandise of the value of several hundrd dollars, which Thomas & Co. claimed were purchased by bankrupt of them through fraud, and that no title to the goods ever passed. On October 7th, the petitioner was duly adjudged a bankrupt. On the 10th of October the said sheriff, under a process of replevin brought by K. O. & Co., who made the same claim, seized other goods. There were

several other similar suits. Assignees in bankruptcy being afterwards appointed, petitioned the bankrupt court for an order directing the parties to deliver the property to the assignees. "The only defense made to the petition on the facts is that the several plaintiffs in the replevin suits owned the property taken and that it was not the property of the bankrupt." Blatchford, Justice, held: "It is manifest from these provisions that when a voluntary petitioner in bankruptcy files his petition in due form, he becomes eo instante a bankrupt, so far as any interference with the property is concerned; and that such property is thereby brought into the bankrupt court and placed in its custody and under its protection as fully as if actually brought into the visible presence of the court. Being in the custody of the bankrupt court, no other court and no other person, acting under any process from any other court, can without permission of the bankruptcy court, interfere with it; and to so interfere is a contempt of the bankruptcy court." "The property being in the bankruptcy court in specie, that court has ample jurisdiction conferred upon it by the bankruptcy act to adjudicate in regard to it. The question before this court now is not who has the rightful title to this property, but whether the lawful possession of it by the court has been unlawfully interfered with." The goods so seized were ordered turned back into the bankruptcy court.

The case on appeal was affirmed by Judge Nelson.

In re. Vogel, 3 N. B. R., 198.

In the case of In re. People's Mail Steamship Co., 2 N. B. R., 552, it was held that after bankruptcy, even proceedings in admiralty in the United States court could not be brought against the res. "If the libellants have any lien on the vessel, the court of bankruptcy has full power to ascertain and liquidate such lien on its being presented in proper form to that court."

See also in re. Rosenberg, 3 N. B. R., 130.

Sampson vs. Burton, 6 N. B. R., 403.

In Sampson vs. Blake, 6 N. B. R., 410, the facts were sub-

stantially the same as those in the case at bar. Goods were seized under a writ of replevin and the bankruptcy court, on petition, ordered the sheriff to turn them over to the assignee. Judge Woodruff says, "The proofs, I think, warranted the conclusion of the court below, that the property in question came to the possession of the assignee as part of the estate of the bankrupt, and was in his possession when Blake took it by writ of replevin. The district court would have failed in its duty had it suffered that possession to be forcibly displaced by a third person, although using the form of process of the state court, to which the assignee was not a party. The district court was open to the application of such third party if he desired to assert title and claim a delivery of the property by the assignee to him."

In the case of In re. Ulrich, 8 N. B. R., 15, H. B. Claflin & Co., and Steiner & Bro., attached the property of the bankrupt in proceedings in the courts of the state of Illinois. On petition those proceedings were enjoined.

In the case of In re. Stedman, 8 N. B. R., 319, immediately after Stedman was adjudged a bankrupt by the register, he appointed him agent to take charge of the property in his possession. While Stedman was holding the property, and before the appointment of an assignee, he was dispossessed of part thereof, to-wit: certain factories, etc., by a county sheriff acting under process of a state court. Ordered that within twenty days respondents deliver to the assignee the possession of the identical lands and tenements seized. Judge Erskine says, from the moment of the filing of the petition, the assets, by operation of law, are to be considered in custodia legis; and between the time of the filing of the petition and the appointment of the assignee it is the duty of the bankrupt to protect the estate and preserve it for creditors, and bring action if he has knowledge of impending danger through local process. The seizure was a contempt of court.

In in re. Brinkham, 7 N. B. R., 421, Fed. Cases, 1884, held that mortgagees should not be permitted to pursue the estate of the bankrupt in the state courts, but should come to the tribunal

which, under the federal laws, is charged with its administration. The opinion is very exhaustive, citing all the cases in bankruptcy; and though by referee, was approved when the matter came before Judge Blatchford.

In the case of Byrd vs. Harrold, 18 N. B. R., 434, mortgagees attempted to foreclose mortgages on property in the possession of the bankrupt. Held, that the mortgagees would be restrained. The sheriff was ordered to deliver the identical property to the assignee. The conduct of sheriff and mortgagees amounted to a contempt of court.

In re. Feeny, 4 N. B. R., 233, was a petition and order to show cause why a mortgagee should not be punished for contempt for violating an order of the court enjoining him from foreclosing a mortgage on stock in trade of the bankrupt after the decree of bankruptcy. The suit to foreclose was commenced in the state court. Held, that the respondent was guilty of contempt, although the injunctional order had not been served upon him personally. He was ordered to pay a fine equal to the amount of loss occasioned by his proceeding.

See also Markson vs. Heaney, 4 N. B. R., 518.

Price vs. Price, 48 Fed. Rep., 823.

In re. Atkinson, 7 N. B. R., 143.

In re. Miller, 6 Bissell, 33.

In re. Wallace, 2 N. B. R., 134.

In re. Bridgeman, 2 N. B. R., 252. Fed. Cases 1867.

That case held that the distribution of the assets of a bankrupt cannot be interfered with by process of a state court; and the assignee was not subject to garnishment in such court.

In re. Kerosene Oil Co., 2 N. B. R., 529. Action of a state court in appointing a receiver of property in the hands of an assignee in bankruptcy, held void. Affirmed, 3 N. B. R., 125, 6 Blatch, 521.

In re. Wynne, 4 N. B. R., 30. "No lien can be acquired or en-

forced by any proceedings in a state court commenced after petition is filed."

Main vs. Glen, 7 Bissell, 93.

In re. Mallory, 6 N. B. R., 22.

Davis vs. Anderson, 6 N. B. R., 145.

Phelps vs. Sellick, 8 N. B. R., 390.

Hyde vs. Bancroft, 8 N. B. R., 24.

Contempt proceedings for violating an order of bankrupt court enjoining further proceedings in state court.

In Hutchins vs. Iron Works, 8 N. B. R., 458, the mortgagee began foreclosure proceedings in state court after filing of petition and before appointment of assignees. Held that filing of petition withheld all power from the mortgagees to take possession of the bankrupt estate, without consent of the bankrupt court.

Walker vs. Seigel, 12 N. B. R., 394.

In re. Sabin, 18 N. B. R., 151. A district court has jurisdiction of a controversy as to the ownership of a fund in the hands or under the control of the assignee in bankruptcy, without regard to the citizenship of the parties in interest.

In Smith vs. Mason, 14 Wallace, 419, it appeared that Sawyer, Risher & Hall held a claim against the United States, which they put into the hands of Taylor for collection. On January 20th, 1867, the firm assigned it to Biddle & Co., by an order on Taylor to pay the proceeds to B. & Co., when collected. The order was accepted by Taylor. B. & Co. assigned the order in turn to Smith. Taylor collected about a thousand dollars, and Sawyer went into bankruptcy, Mason being appointed his assignee. The firm of Sawyer, Risher & Hall was dissolved. Taylor then collected $4,700.00. Mason as assignee filed a bill in the bankrupt court for an accounting against Risher & Hall; and on April 7th, 1869, filed a petition again Smith, alleging B. & Co. had been paid in full and asked for an order on him to show cause why the money should not be decreed to him, Mason, as assignee. Smith

appeared and set up his claim to the money. B. & Co. were not parties, and did not appear. The court made an examination of the accounts between S. R. & H. and B. & Co., decided that the original debt due B. & Co. was satisfied, and that the funds in the hands of Taylor should be paid over to Mason, the assignee. The circuit court on appeal decided that the money belonged to Risher & Hall, and ordered it paid over to them. Smith claimed to have absolute title to the money, and to be a bona fide purchaser for value. None of the money ever came into the possession of the bankrupt or his assignee, the bankrupt having parted with the legal title. This court on appeal held that the title thus claimed by Smith and Biddle and Co. could not be decided in a summary proceeding on an order to show cause, and that the following clause of the bankrupt act of 1867 gave the right to a proceeding either at law or in equity in which there should be parties, either in the district or the circuit court of the United States, to determine the title to the res.

"Said circuit courts shall also have concurrent jurisdiction with the district courts of the same district of all suits at law or in equity which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt, transferable to or vested in such assignee." The court say, the assignee in bankruptcy had neither the possession nor the right of possession to the money at the time the petition for the rule was filed.

In Marshal vs. Knox, 16 Wallace, 551, the facts were that Marshal owned a plantation, and leased it to Nathan Smith and Henry Fuller. The tenants being in arrears $1,400.00 Marshal, on January 4th, 1868, commenced an action in the district court of a parish in Louisiana, and obtained a writ of provisional seizure, which was served by the sheriff on January 6th, 1868, by serving a copy on the lessees, and by seizure of their property. Afterwards, on January 15th, 1868, the lessee Smith filed a petition in bankruptcy, and was declared a bankrupt on February 12th, 1868.

The assignee on a rule upon Marshal and the sheriff obtained an order to show cause why the property should not be delivered to the assignees. On a hearing the rule was made absolute. The bankrupt court refused to allow an appeal, and Marshal filed his bill in the circuit court for the district of Louisiana, to enjoin the assignee from proceeding. It was held by this court upon appeal that the circuit court should have entertained jurisdiction of the bill. That the marshal and the sheriff had a right to retain possession of the property, having got possession thereof previous to any bankruptcy proceedings, and having a valid lien thereon; and such possession being lawful and adverse, and obtained before the bankruptcy proceedings, the court should not have ordered the same turned over to bankrupt's assignee on an order to show cause.

The case of Eyster vs. Gaff, 91 U. S., 521, involved the title to real estate. A mortgage was given by McClure and in 1868 the mortgagee commenced foreclosure proceedings. Under a decree in 1870 the plaintiffs became purchasers. Before the decree, but long after the proceedings were commenced for foreclosure, McClure became a bankrupt. The defendant in the ejectment suit was tenant under McClure. The contention was that no title passed to the purchasers under the decree of foreclosure. The bankrupt court never took any steps to stay the proceedings in foreclosure, and never concerned itself therewith. This court held that under such circumstances the purchaser at the foreclosure sale obtained a good title. In the opinion in this case will be found the language upon which the petitioners base their contention that the order made by Judge Seaman was coram non judice. The language evidently applies to such a state of facts as that pre sented by Mason vs. Smith and Marshal vs. Knox. If, by stretching the meaning of that language to the utmost, it can be said to apply to such a state of facts as is presented in the case at bar, we suggest, with great respect for the opinions of the learned Judge who delivered that opinion, that the language is subject to the criticism of Chief Justice Marshal in the case of Cohens vs. Virginia, 6 Wheat., 399.

The case of Burbank vs. Bigelow, 92 U. S., 179, arose in the circuit court of the United States for the district of Louisiana, and was brought under Section 2 of the original bankrupt act of 1867. Section 4979 of the Revised Statutes. The bankrupt Bigelow in his schedule disclaimed all interest in the res, which was a judgment, and the proceeds of the judgment never came into the hands of the bankrupt or the assignee. The first court to get possession of the res was the court of original jurisdiction in the case of Burbank vs. Bigelow. The Court will notice that the section we have quoted in Smith vs. Mason has undergone a change, and appears as Section 4979 R. S. The case was decided on the authority of Lathrop vs. Drake, 91 U. S., 516.

Petitioners rely on the case of Donaldson vs. Farwell, 93 U. S., 631. The case merely held that where the assignee in bankruptcy brought suit for taking goods which, at some time before the adjudication in bankruptcy, had been in possession of the bankrupt, the defendants could set up the defense that the bankrupt had purchased the goods of defendants under false pretenses; and that the assignee in bankruptcy was not a bona fide purchaser for value. As said by Judge Seaman in his opinion the action was brought under Sec. 4979 R. S. The question here presented could not arise and was not discussed in that case.

Claflin vs. Houseman, 93 U. S., 130. held that the assignee might sue in state courts to recover the assets of the bankrupt.

In Yeatman vs. the Savings Institution, 95 U. S., 764, F. and H. on July 22nd, 1871, pledged with the New Orleans Savings Institution two certificates of indebtedness issued by the state of Louisiana, to secure their promissory note to said institution. No question of the legality of the pledge was raised. November 27th, 1871, F. and H. were adjudged bankrupts, and the assignee demanded the certificates of indebtedness from the Savings Institution; and upon their refusal, brought suit in the circuit court of the United States for the district of Louisiana for the value of the certificates. Held that he could not recover. There was nothing in the bankrupt law avoiding such a pledge. Court say, if

the assignee regarded the certificates as of greater value than the debt for which they had been pledged, or if the interest of the creditors required prompt action, he had authority under the statute and the orders of the court to tender performance of the contract of pledge, or to discharge the debt for which the certificates were held. He had the right, perhaps, under orders of the court to sell them, subject to the claim of the defendant in error.

IV

DECISIONS UNDER THE PRESENT BANKRUPT ACT.

In Blake et al. vs. Francis Valentine Co., 89 Fed. R., 691, it is said, in proceedings relating to voluntary bankruptcy the filing of the petition is of itself an act of bankruptcy, and the debtor thus surrenders all his estate and effects for the benefit of his creditors, and is at once, without a hearing, adjudged a bankrupt. The district court is thereby clothed in such a case, upon the filing of the petition, with jurisdiction over the debtor and his property. The court is authorized to take such steps as may be necessary to protect creditors.

In In re. Brooks, 91 Fed. R., 508, the court say, "The assets of the bankrupt are brought by the proceedings within the reach and control, and subject to the orders of the court, and no one has any right to remove or meddle with them but for their preservation without leave of the court, except the trustee. Anyone so doing will be subject to the penalty provided for in Section 29b." See also,

In re. Smith, 92 Fed. R., 135.

Ethridge Furniture Co., 92 Fed. R., 329.

In re. Brown, 91 Fed. R., 358.

In re. Francis Valentine Co., 93 Fed. R., 953.

In re. Richard, 94 Fed. R., 633.

Norcross vs. Nathan, 99 Fed. R., 417.

In re. Cobb, 96 Fed. Rep., 821.

"The assertion of any right against, or to participate in the res so in custodia legis must be sought in the court in whose custody it is. Any attempt to assert such right elsewhere would be regarded as a contempt."

So held in Carter vs. Hobbs, 92 Fed. R., 594.

See also Southern Loan & Trust Co. vs. Benhow, 96 Fed. R., 514.

In the case of In re. Brooks, 91 Fed. R., 508, it appeared that at the time of the adjudication the petitionee held a chattel mortgage, of which the conditions were broken, on the goods of the bankrupt, and that the constable had taken the property under the chattel mortgage and locked it up in a room on the bankrupt's premises, and taken the key. After notice of bankruptcy proceedings, the constable sold the mortgaged property to the petitionee. It was held that the court of bankruptcy had jurisdiction of the petition by the trustee for an order directing a restoration to said trustee of the property of the bankrupt, so held under the chattel mortgage.

Another case is that of In re. Gutwilling, 90 Fed. R., 481. Replevin suit in a state court. That case is different from the one at bar, however, in that the suit was brought in the state court before the adjudication of bankruptcy.

In Keegan vs. King, 96 Fed. R., 758, the trustee came into possession of certain personal property. The defendants claimed title thereto and brought suit in a superior court of the state of Indiana to restrain the trustee from selling said property, and to establish the title in the defendants. This action was restrained by an order issued by Judge Baker from the district court. The res was in the custody of the bankrupt court, and could not be interfered with by action in the state court. The case is directly in point.

Another case is that of In re. Agins. This case arose in the second circuit before Judge Addison Brown, district judge for the southern district of New York. We have been unable to find

ny report of the case, but the facts were that Jacob Agins filed is petition in bankruptcy December 19th, 1898, before which ime H. B. Claflin Co. commenced an action of replevin in the city ourt of the city of New York. On petition Judge Brown en- ered an order restraining the H. B. Claflin Co. and sheriff of New York, and their attorneys, from proceeding in the replevin uit. The court refused to vacate the order, and the question vas brought before the circuit court of appeals for the second judi ial circuit, where the order of Justice Brown was unanimously ffirmed. See in re. Agins, 92 Fed. R., 1018, 34 C. C. A., 682.

The report as it there appears is as follows: "Before Wallace, Lacombe and Shipman, Circuit Judges. No opinion. Order of Circuit Court affirmed."

We have gleaned the facts in the case from volume 1, No. 8 of he National Bankruptcy News, page 180, and volume 1, No. 6 National Bankruptcy News, page 133.

Another case directly in point is that of In re. Endl, 99 Fed. R., 915. A trustee in bankruptcy had peaceably acquired posses- ion of personal property, claiming it as assets of the estate. A constable acting under process issued by a justice of the peace, seized the property. On summary proceedings he was ordered to return the goods to the trustee. Opinion by Wellborn, District Judge.

We call especial attention to In re. Chambers Co., 98 Fed. Rep., 865, also directly in point.

Counsel's argument seems to be founded on two propositions:

First. That by Section 23b of the bankrupt law the state courts have exclusive jurisdiction of all actions or proceedings, unless there is diverse citizenship and more than two thousand dollars involved; or unless the claimant consents to have the mat- ter tried by the bankrupt court.

Second. That the bankrupt law does not give the bankrupt court any jurisdiction to determine title to property in its custody and under its control, and therefore the district court for the east

ern district of Wisconsin was without jurisdiction to make the order that the goods should be turned back into the custody of that court, because, after they were turned back and the court again got possession of the goods, that court would not have jurisdiction of any proceeding that might thereafter be instituted for the purpose of determining the title thereto.

AS TO SECTION 23B.

We fail to see how it can become necessary in this case for this Court to construe Section 23 of the bankrupt law. It will be noticed in the first place that Subdivision b of that section begins as follows: "SUITS BY THE TRUSTEE," etc. This is not a suit by a trustee. It is a summary proceeding in equity for the court's own protection. It is a proceeding under Subdivisions 13 and 15, of Section 2 of the bankrupt act. The only suit that has been brought is the replevin suit in the state court, inaugurated by petitioners.

As to their contention that the bankrupt court has not power to determine the title to res in its custody, we refer merely to Section 2 of the bankrupt law, expressly giving such power. We further call attention to the fact that the bankrupt court has, by express enactment of congress for the first time in bankruptcy legislation, been created a court of equity as well as law, as has been recognized by your Honors in Rule 37, relating to bankruptcy proceedings. Every court of chancery, as we have already shown, has inherent power and jurisdiction to determine title to res in its custody.

Section 23 of the bankrupt law has been construed by the judges of the circuit court of appeals in several districts, and in numerous decisions by district judges. In the overwhelming majority of cases this Section 23 has been construed as a limitation upon the jurisdiction of the United States Circuit Court. In one or two decisions it has been construed as a general limitation on United States Courts and in some decisions an intermediate position has been taken. The various constructions have been elabor-

ately argued by hte federal judges. As we do not think this case involves the construction of that section of the bankrupt law, and as we are of the opinion that if it does involve such construction the questions have been much more ably argued by the federal courts than they can be by us, we shall simply refer the court to some of the principalc ases. One of the most thorough opinions is that delivered by Judge Lowell of the first district in the case of In re. Hammond, 98 Fed. R., 845. The various constructions are examined at great length. The great weight of authority is in favor of the jurisdiction of the district courts, as is shown by this opinion.

We also refer the Court to In re. Sievers, 91 Fed. R., 366. Affirmed in Davis vs. Bohle, 92 Fed. R., 325.

Carter vs. Hobbs, 92 Fed. R., 594.

In re. Gutwillig, 92 Fed. R., 337.

In re. Newberry, 97 Fed. R., 24.

Leidigh Co. vs. Stengel, 95 F. R., 637.

Pepperdine vs. Headley, 98 Fed. Rep., 863.

Shutts vs. Bank, 98 Fed. Rep., 705.

Louisville Trust Co. vs. Marx, 98 Fed. Rep., 456.

Murray vs. Beal, 97 Fed. R., 567.

Cox vs. Wall, 99 Fed. R., 546.

Lehman vs. Crosby, 99 Fed. R., 543. This case suggests that the section applies to suits for the collection of debts.

Norcross vs. Nathan, 99 Fed. Rep., 414.

We also beg to call your Honor's attention to the case of In re. Woodbury, 98 Fed. R., 833, where Judge Amidon has construed this section and attempted quite successfully to reconcile the different provisions of the act.

See also an able opinion by Referee Olmstead in the matter of Murphy, volume 2, No. 8, page 393, et seq., National Bankruptcy News and Reports.

The case of In re. Kelley, 91 Fed. R., 504, seems to be correctly decided. There no adjudication in bankruptcy had taken place. The petition, instead of being for an injunction, was for the seizure of the property under Section 69, and it did not appear that the person proceeded against was insolvent.

The case of Mitchell vs. McClure, 91 Fed. R., 621, simply held that a plenary common law action of replevin cannot be instituted by a receiver in a district court. It decided nothing else. The court says, "What the jurisdiction of the district court, sitting as a court of bankruptcy, may be in other forms of procedure, or what its powers to reclaim or otherwise take possession of the bankrupt's property, are questions not now before us." In that case the res was never within the jurisdiction of the court.

In case of In re. Brodbine, 93 Fed. R., 643, the res had never stood in the name of the bankrupt, and never came into the possession of the court or its officers.

In the case of Heath vs. Schaffer, 93 Fed. R., 647, possession was taken under a chattel mortgage several months before bankruptcy. Court says, that if the proceedings had been brought for the purpose of taking property away from the trustee, or for interfering with the control of the property in custodia legis, a different question would be presented.

In the Abrahams case, 93 Fed. R., 772, the assignee in voluntary assignment took possession before any proceedings in bankruptcy were instituted, and sold the goods to B., who purchased them for a full consideration. The case would be parallel to the one at bar if the assignee in voluntary assignment had been appointed after bankruptcy, and then had attempted to take goods from the trustee.

This is an equitable proceeding in bankruptcy; one distinctly arising out of the fact of bankruptcy. It is derived through no assignment, legal or equitable, by instrument or deed from the bankrupt. If bankruptcy had not occurred, this summary procedure to have certain property returned to the custody of this

Court could not have been brought by the bankrupt in any court. If Cogan & Co. had seized these goods out of the possession of the bankrupts, and no bankruptcy had ever taken place, the bankrupts might have been defendants in an action to determine the title. Or, if the goods had been taken by Cogan & Co. without process, the bankrupts might have brought a suit to determine title. But this is not a suit to determine title. It is therefore distinctly such a proceeding as could never have been brought or instituted by the bankrupts if no bankruptcy had occurred. It is therefore not within Section 23 under any circumstances.

In re. Brooks, 91 Fed. R., 508.

Murray vs. Beal, 97 Fed. R., 567.

The same Judge who decided In re. Endl, 99 Fed. R., 915, had, previous to that decision, decided in the case of Perkins vs. McCauley, 98 Fed. R., 286, that the district court did not have jurisdiction under Section 23 of a bill to set aside a conveyance on account of fraud, following those few decisions limiting the jurisdiction of United States Court. And yet, when the question involved in this case came before that Judge, he without hesitation, on petition and order to show cause, ordered the constable to restore the goods seized to the custody of the bankrupt court.

V.

FURTHER ASPECTS OF THE QUESTION.

The first question should be aswered in the affirmative. The court had jurisdiction by summary proceedings to compel the return of the property seized.

THIS PROCEEDING HAS ABSOLUTELY NOTHING TO DO WITH THE LAWFUL TITLE TO THE PROPERTY SEIZED. THE LEGAL TITLE DID NOT COME INTO CONTROVERSY, AND NO DETERMINATION IN RESPECT THERETO WAS MADE.

It will be noticed that the order is very carefully drawn. That in the first place it merely restrained the disposition of the prop-

erty, and in the second place, directed those having possession thereof to turn over and deliver the same to the trustee within twenty days. And further, the order carefully provides that the trustee shall keep the property when delivered to him, apart and separate from the other property, to abide the further order of the court; and if the court should afterwards order a sale thereof, the proceeds of the sale should be kept separate. This last provision made it possible for the trustee to sell the property under order of the court, upon stipulation of all parties in interest, as was actually done. The greatest care was taken in drawing the order not to affect any rights which Cogan & Co. might have to the property or proceeds thereof. Absolutely nothing was determined in this proceeding as to the legal title thereto.

The law is very clear that such an order may be made upon a rule to show cause. See the opinion of Chief Justice Marshal in the case of Slocum vs. Mayberry already quoted, and the many cases which we have cited in this brief.

A trustee under the bankrupt law occupies a stronger position than does a receiver under the chancery practice of the federal courts. He is something more than a receiver, as Chief Justice Shaw said in the Nahant Bank case. The practice, however, in chancery in the case of receivers has settled that just such an order as that entered in this case may be made in a summary proceeding. "It is unnecessary to file a bill in chancery under such circumstances, but a receiver may apply by a montion or petition in the receivership suit for an injunction against the prosecution of actions against the property that can only be brought by leave of the court appointing him, or against other acts of interference with his possession."

Volume 17 Ency. of Pleading and Practice, page 774, and cases there cited. So held by this Court in an opinion by his Honor Mr. Chief Justice Fuller in the case of In re. Tyler, 149 U. S., 164.

Ex parte Chamberlain, 55 Fe l. R., 704, where an order quite

similar to that entered by Judge Seaman was made by Judges Goff and Simonton. In that case state officers attempted to levy on property in the hands of the receiver, to satisfy taxes. See also Virginia Steel & Iron Co. vs. Land Co., 88 Fed R., 134.

There is no doubt of the right of a court of chancery to summarily punish for contempt any violation of an injunction against interference with property within its custody. American Co. vs. Jacksonville R'y. Co., 52 Fed. R., 937.

Suppose this property had been in the court room, where the court was in session, and the sheriff under a writ of replevin from a state court had attempted to seize the property. Could it be contended that the court could not summarily retake the property, through its marshal, and even punish the sheriff for contempt? Yet counsel would claim that Sec. 23b divests the court of this right.

The line could be more clearly drawn by supposing another case, to-wiv: that Cogan & Co., instead of being residents of the state of Massachusetts, had resided in the eastern district of the state of Wisconsin, and had for a long time previous to the adjudication had these goods in their possession, claiming legal title thereto. In such a case it is possible that the court could not, on summary process, order Cogan & Co. to turn the goods over to the trustee. Certainly they could not, in such proceeding, determine the title. In such case the trustee might have filed a bill in equity in the bankrupt court to have Cogan & Co.'s title declared void, and to have the goods turned over to the trustee. Under such circumstances it would be necessary to construe Section 23 of the bankrupt act.

If Cogan & Co. had seized these goods under an attachment within four months preceding the date of the adjudication, that also would present another question, and one not now before the court.

The remedy of petitioners, or rather Cogan & Co., is clear. They should institute some proceeding in the bankruptcy court

to determine the title to the goods; or, under the present circumstances, as the goods have been sold under stipulation, to determine the title to the proceeds. In chancery the remedy is a bill pro interesse suo. In bankruptcy, however, they would perhaps be entitled to have an issue made up and have the matter tried by a jury, express provision for a jury being made by Section 19 of the bankruptcy act.

It cannot avail petitioners to assert here that state courts have concurrent jurisdiction with bankruptcy courts in certain proceedings. If the state court and the bankruptcy court have concurrent jurisdiction to determine the title to res, the res having come into the possession of the bankrupt court and under its control, and in its custody, that court has exclusive jurisdiction. Where two courts have concurrent jurisdiction, the court first securing jurisdiction over the res will retain that jurisdiction for all purposes. It has therefore become necessary for Counsel to urge that the state courts have exclusive jurisdiction of proceedings in bankruptcy. Such a construction would annihilate the bankrupt law and is impposible. The court may dissolve liens and attachments, and fraudulent preferences (Section 67); but Counsel denies it the power to protect its own jurisdiction.

Counsel has argued in the course of this proceeding that no appeal is provided from a decision respecting such title, and hence the district court has no power to decide respecting the title.

Certainly Counsel has the remedy which he has taken advantage of in this case, and he probably has others. If not, it is immaterial. As being directly in point on that argument we refer to what Mr. Justice Story says in 3 Howard, on page 317, in the case of In re. Christy.

It is respectfully submitted that the first question certified to this Court should be answered in the affirmative; and the second question should be answered in the negative.

CHARLES BARBER,
Counsel for Respondents.

CARL D. JACKSON,
Of Counsel.

WHITE *v.* SCHLOERB.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 530. Submitted April 26, 1900. — Decided May 28, 1900.

After an adjudication in bankruptcy, an action of replevin in a state court cannot be commenced and maintained against the bankrupt to recover property in the possession of and claimed by the bankrupt at the time of that adjudication, and in the possession of a referee in bankruptcy at the time when the action of replevin is begun; and the District Court of the United States, sitting in bankruptcy, has jurisdiction by summary proceedings to compel the return of the property seized.

THIS was a petition in equity to the Circuit Court of Appeals for the Seventh Circuit, under the jurisdiction conferred upon that court by the second clause of section 24 of the Bankrupt Act of July 1, 1898, c. 541, to superintend and revise in matter of law the proceedings in bankruptcy of the District Courts of the United States in that circuit. 30 Stat. 553. The Circuit Court of Appeals certified to this court the following statement of the case and the questions of law:

"On September 13, 1899, August T. Schloerb and Eugene B. Schickedantz, who were respectively residents and inhabitants of the Eastern District of Wisconsin, and who were copartners in trade in the said district, filed their voluntary petition in bankruptcy in the District Court of the United States for that district. On the same day they were duly adjudged

Statement of the Case.

bankrupt by that court, and the matter referred to a referee in bankruptcy for further proceedings according to law. They had at that date a stock of goods contained in a store, the entrance to which was locked by the direction of the referee.

"Thereafter, on September 21, 1899, James Cogan and Bernard Cogan, who were copartners, commenced an action of replevin against the bankrupt in the circuit court of the State of Wisconsin for the county of Winnebago, in which county the store of the bankrupts was located, to recover the possession of certain specified goods, then in the store of the bankrupts, and forming part of their stock of goods. On the same day, the proper undertaking and requisition to the sheriff of the county of Winnebago, according to the law of the State of Wisconsin, were delivered to the petitioner Charles M. White, who was then the sheriff of the county, who delivered it for execution to the petitioner Henry Eckstein, who was the under-sheriff of said sheriff. In pursuance of said requisition, the under-sheriff, on the same day, and before the selection and appointment of a trustee in the bankrupt proceedings, forcibly entered the store of the bankrupts, and took possession of certain goods, part of the goods specified in the writ of replevin.

"On September 23, 1899, the bankrupts presented their petition to the District Court of the United States for the Eastern District of Wisconsin, setting forth the facts above recited, and also alleging that the goods so taken under the writ of replevin were part of a bill of goods purchased by them of the plaintiffs in that writ, and were their lawful property. The petition alleges that the goods were in the possession of the petitioners, the sheriff and under-sheriff mentioned, and John C. Thompson, the attorney for the plaintiffs in the writ of replevin, and asked the court that they be compelled to redeliver the goods to the District Court sitting in bankruptcy, from whose possession they were taken, and that they be enjoined from any disposition thereof. Upon the filing of the petition the District Court issued its mandate requiring the petitioners here, the sheriff, the under-sheriff and the attorney mentioned, to show cause before that court, at a time and place mentioned, why the seizure of the goods under the writ of replevin should not be vacated and set aside,

and the goods returned to the bankrupts, or placed in the possession of the marshal of the court, or such other person as the court should direct, and why they should not be respectively enjoined from interference with the property so seized, and in the mean time restraining them from such interference. The petitioners specially appeared upon the return day mentioned in the mandate; and moved the District Court to set aside and vacate its mandate or order to show cause, for want of jurisdiction in the court of bankruptcy over the subject-matter; and also presented proof by affidavit to the effect that the assertion of title to the goods in question by the plaintiffs in the writ of replevin was founded upon the claim that the bankrupts had purchased the goods of them upon false and fraudulent representations upon which reliance had been placed, and that before the writ of replevin they had elected to rescind the sale and had demanded of the bankrupts the return of the goods. The court of bankruptcy at the hearing and on October 26, 1899, made the following order: 'It is hereby ordered that the said Charles M. White, Henry Eckstein and John C. Thompson be, and they are hereby, restrained from sale or other disposition of the property mentioned in said petition herein; and they are hereby directed to turn over and deliver the said property, so taken by them from the estate of the bankrupts, to the trustee appointed herein, within twenty days from the date of this order; and it is further ordered that the trustee, on delivery of the said property, keep the same separate and apart from other property, to abide the further order of the court; and that, in case sale of said property is hereafter ordered, the proceeds of said sale be kept separate and apart to abide such further order of the court.' The opinion of the court upon that hearing is reported *In re Schloerb*, 97 Fed. Rep. 326.

"The petitioners here, by their original petition filed in this court, have presented the matters of law raised by the order so made by the District Court sitting in bankruptcy.

"The questions of law upon which this court desires the advice and instruction of the Supreme Court are:

"First. Whether the District Court sitting in bankruptcy had jurisdiction by summary proceedings to compel the return of the property seized?

"Second. Whether, after adjudication in bankruptcy, an action in a state court can be commenced and maintained against the bankrupt to recover property in the possession of and claimed by the bankrupt at the time of the adjudication?

"Third. Whether the property of a bankrupt, upon his adjudication in bankruptcy, is *in custodia legis* of the bankruptcy court, and can be taken possession of under process of a state court?"

Mr. Charles W. Felker and *Mr. John C. Thompson* for White.

Mr. Charles Barber and *Mr. Carl D. Jackson* for Schloerb.

Mr. Justice Gray, after making the above statement, delivered the opinion of the court.

The material facts of this case may be briefly recapitulated. After the District Court of the United States had adjudged Schloerb and Schickedantz bankrupts on their own petition, and had referred the case to a referee in bankruptcy, and the referee had taken possession of the bankrupts' stock of goods in their store, and had caused the entrance of the store to be locked up, and before the appointment of the trustee in bankruptcy, a writ of replevin of some of those goods was sued out by other persons against the bankrupts from an inferior court of the State of Wisconsin, and was executed by the sheriff of the county, by his deputy, by forcibly entering the store and taking possession of these goods. The bankrupts thereupon presented to the District Court of the United States a petition, setting forth the above facts, and alleging that the goods replevied were their lawful property, and had been purchased by them of the plaintiffs in replevin, and were now in the possession of the sheriff and his deputy and the attorney of those plaintiffs; and praying that they might be compelled to redeliver the goods to the District Court sitting in bankruptcy, and be restrained from making any disposition thereof. Upon the filing of this petition, the court ordered notice thereof

to said sheriff, deputy and attorney. In answer thereto, they contended that the court had no jurisdiction over the subject-matter; and offered evidence that the grounds of their action of replevin were that the bankrupts had purchased and obtained the goods from them by false and fraudulent representations on which they relied, and that, before suing out the writ of replevin, they had elected to rescind the sale, and had demanded of the bankrupts a return of the goods. The District Court, upon a hearing, made an order restraining the respondents from selling or otherwise disposing of the goods replevied, and directing them to deliver the goods to the trustee in bankruptcy, and directing the trustee, on such delivery, to keep them apart from other property, to abide the further order of the court.

The questions certified concern, not the trial of the title to these goods, but only the judicial custody and lawful possession of them.

Under sections 33–43 of the Bankrupt Act of 1898 and the Twelfth General Order in Bankruptcy, referees in bankruptcy are appointed by the courts of bankruptcy, and take the same oath of office as judges of United States courts, each case in bankruptcy is referred by the court of bankruptcy to a referee, and he exercises much of the judicial authority of that court. 30 Stat. 555–557; 172 U. S. 657.

At the date of this adjudication in bankruptcy by the District Court of the United States, the goods were in the store of the bankrupts, and in their actual possession, and were claimed by them as their property. On the same date, that court referred the case to a referee in bankruptcy, and by his direction the entrance to the store was locked. The goods were then in the lawful possession of and custody of the referee in bankruptcy, and of the bankruptcy court, whose representative and substitute he was. Being thus in the custody of a court of the United States, they could not be taken out of that custody upon any process from a state court.

So far as regards this point, the decision of this court in *Freeman* v. *Howe*, 24 How. 450, more than covers the case. It was there adjudged that property taken and held by a marshal

on a writ of attachment from a court of the United States, directing him to attach the property of one person, could not be taken from his possession on a writ of replevin from a state court in behalf of another person who claimed the attached property as his own. See also *Peck* v. *Jenness*, 7 How. 612, 625; *Buck* v. *Colbath*, 3 Wall. 334, 341; *Covell* v. *Heyman*, 111 U. S. 176, 182.

The second question certified relates to this point, although it is not so clearly expressed as it might be, and omits to mention in whose possession the property was when the writ of replevin was sued out. To that question, as explained and restricted by the facts set forth in the statement which accompanies it, our answer is: "After an adjudication in bankruptcy, an action of replevin in a state court cannot be commenced and maintained against the bankrupt to recover property in the possession of and claimed by the bankrupt at the time of that adjudication, and in the possession of a referee in bankruptcy at the time when the action of replevin is begun."

The first question remains: "Whether the District Court sitting in bankruptcy had jurisdiction by summary proceedings to compel the return of the property seized?"

By section 720 of the Revised Statutes, "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." Among the powers specifically conferred upon the court of bankruptcy by section 2 of the Bankrupt Act of 1898 are to "(15) make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act." 30 Stat. 546. And by clause 3 of the Twelfth General Order in Bankruptcy applications to the court of bankrupty "for an injunction to stay proceedings of a court or officer of the United States, or of a State, shall be heard and decided by the judge; but he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts." 172 U. S. 657.

Not going beyond what the decision of the case before us

requires, we are of opinion that the judge of the court of bankruptcy was authorized to compel persons, who had forcibly and unlawfully seized and taken out of the judicial custody of that court property which had lawfully come into its possession as part of the bankrupt's property, to restore that property to its custody; and therefore our answer to the first question must be: "The District Court sitting in bankruptcy had jurisdiction by summary proceedings to compel the return of the property seized."

These answers to the first and second questions render any further answer to the third question unnecessary.

Ordered accordingly.